SUPREME COURT U. S.
JUL 26 1974
MICHAEL RODAK, JR., CLERK

NO. 74-19

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

CHESTER BREWER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

CHESTER BREWER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals is reported at 491 F(2) 616. (App. A-1-10) The Memorandum Opinion of the trial court Reconsidering Defendants' Sentences is set forth in the Appendix at page A-11-17.

JURISDICTION

The Judgment of the trial court was affirmed by the United States Court of Appeals December 6, 1973, a first Motion for Rehearing was denied February 4, 1974, however, the cause was retained and the cause partially remanded to the trial court for re-

consideration of the sentences. An application for leave to file a second motion for rehearing was denied on February 26, 1974. A Motion for stay of mandate and for leave to file another Motion for Rehearing was denied June 6, 1974.

Jurisdiction is based on Title 28 U.S.C.A. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

FIRST: **WAS PETITIONER CONVICTED AND SENTENCED WITHOUT DUE PROCESS TO CONSECUTIVE ONE YEAR TERMS ON EACH OF FIFTEEN COUNTS OF MAIL FRAUD AND SECURITIES FRAUD, PLUS A $27,000.00 FINE, IN THAT:**

(1) THE COURT'S INSTRUCTIONS WERE FAULTY AND IMPERMISSIBLY FAVORABLE TO THE PROSECUTION, AND

(2) NO EVIDENCE, DIRECT OR CIRCUMSTANTIAL, WAS OFFERED FROM WHICH CRIMINAL INTENT COULD BE INFERRED?

SECOND: **WAS PETITIONER CONVICTED AND SENTENCED WITHOUT DUE PROCESS ON COUNTS I, V, VI, VII, VIII AND IX, WHEN**

(1) HE NEITHER COMMITTED NOR CAUSED TO BE COMMITTED ANY

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OF THE ACTS ALLEGED, APPARENTLY BEING CONVICTED ON A CONSPIRACY THEORY WHEN NOT CHARGED WITH CONSPIRACY, AND

(2) THE ACTS ALLEGED IN ALL OF SAID COUNTS EXCEPT COUNT I WERE INCIDENTAL TO THE ALLEGED SCHEME RATHER THAN STEPS IN ITS EXECUTION?

THIRD: WAS PETITIONER CONVICTED AND SENTENCED WITHOUT DUE PROCESS WHEN HE WAS ASSESSED FIFTEEN SENTENCES FOR WHAT ESSENTIALLY WAS ONE TRANSACTION?

FOURTH: WAS THE COURT OF APPEALS WITHOUT AUTHORITY TO REDUCE THE SENTENCE IT FOUND TO BE "UNCONSCIONABLY EXCESSIVE," AFTER THE TRIAL JUDGE REFUSED TO REDUCE THE ORIGINAL SENTENCE?

PERTINENT STATUTES AND REGULATION

PETITIONER WAS INDICTED ON FIFTEEN COUNTS. THE FIRST NINE COUNTS ALLEGED VIOLATIONS OF THE MAIL FRAUD STATUTE,

18 U.S.C.A. § 1341 (App. A-18) and the AIDING AND ABETTING STATUTE, 18 U.S.C.A. § 2 (App. A-19). THE LAST SIX COUNTS ALLEGED VIOLATIONS OF THE SECURITIES FRAUD STATUTE, 15 U.S.C.A. § 78j(b) (App. A-20) and 17 CFR § 240.10b-5 (App. A-22). THE PENALTY STATUTE APPLICABLE TO THE SECURITY FRAUD COUNTS IS 15 U.S.C.A. § 78ff(a) (App. A-23).

STATEMENT OF THE CASE

Petitioner and Richard Mackay were indicted July 23, 1971 on 15 counts of mail fraud and securities fraud (9 counts of mail fraud and 6 counts of securities fraud). In December 1972, they were tried before a jury and found guilty of all counts. Petitioner did not testify. He and Mackay were each sentenced to one year on each count to be served consecutively or 15 years and a fine of $1,000.00 on each of the first nine counts and $3,000.00 on each of the last six counts for a total fine of $27,000.00 (App. A-66-74).

The indictment charged Petitioner and Mackay with devising a scheme to defraud policyholders, claimants, creditors and minority stockholders of Federated Securities Insurance Company (Federated) and to obtain money by false pretenses and representations.

H. Smith Hagan, President of Trans-National Service Corporation, the owner of 93% of the stock of

Federated, desired to sell such stock and wanted $3,000,000 in cash. He was put in touch with Mackay through an insurance company broker. After several months of negotiations, a final agreement was reached on June 30, 1969 (Def. Ex. M-5) and the sale was closed in the A.M. of July 30 in Salt Lake City (Pl. Ex. 4, App. A-55-65). The purchase price was $3,790,000 of which $3,000,000.00 was paid in cash and $790,000 was to be in mortgages. A New Orleans brokerage, Dorsey and Company, was to loan the $3,000,000 cash to Kaymac Industries, Inc. (Kaymac), then recoup its loan by selling the securities (about $4,500,000 in value) in Federated's portfolio. These securities were in turn to be replaced by federally insured first mortgages (about $6,000,000 in value) having a higher yield than the Federated securities. (Pl. Ex. 13-16; Ex. K. Pl. Ex. 25A). The substitution of mortgages for securities was being done with the approval and supervision of the Utah Insurance Commission. The difference in value between the securities sold and the mortgages brought in, about $1,500,000 was to constitute a credit to Kaymac.

The mortgages were to be furnished by United Housing Corporation (United) the assignee of Peoples Bond and Mortgage Company). Kaymac issued its notes, signed by Mackay, its President and Board Chairman, totalling $4,500,000—for the $6,000,000 in mortgages. To secure the notes, United required a "take-out" letter from Federated, and allegedly a reassignment of the mortgages. (Ex. K of Pl. Ex. 25A;

Pl. Ex. 25B, 25C). Kaymac was unable to pay the notes when due and Mackay's plan collapsed. Federated was put into rehabilitation proceedings and the indictments of Mackay and Petitioner took place in 1971.

Brewer was employed by Mackay in the early part of July 1969, after Mackay had reached agreement with Hagan for the purchase by Kaymac of the Federated stock. In the last part of July, he was elected Assistant Secretary of Kaymac (Ex. H. of Pl. Ex. 25A). After the purchase of Federated was closed, he became a director and officer (secretary-treasurer) of Federated. At no time did he own any stock of Kaymac and had no authority to sign for it or Federated (R.495, 522-523, App. A-79-81). He received no money or anything of value as a result of any act alleged in the indictment. No proof was offered as to his participation in any decision making on behalf of Mackay or Kaymac.

Petitioner at no time signed a definitive agreement or committment on behalf of Kaymac or Federated, as all such agreements were signed by Mackay as President of Kaymac or Federated. Petitioner did sign many instruments received in evidence, mostly to attest Mackay's signature or to implement committments already made by Mackay. He helped carry out the terms of the purchase agreement by checking the Federated securities portfolio and transmitting such securities to Dorsey. He assisted in the negotiations for the acquisition of mortgages. Significantly,

there was no proof offered that he at any pertinent time had information that Kaymac could not perform its obligations. There is no proof that he misrepresented any material fact or that anyone relied on anything he said to their detriment.

Petitioner's trial attorneys filed a Motion to Withdraw prior to the trial (Vol. VII of R., p. 72-74). The associate counsel was permitted to withdraw, however the court denied the motion of trial counsel, Kenneth A. Herridge to withdraw (Vol. VII of R. p. 88, 98). During the trial, the trial counsel, as the record will reflect, pretty much adopted a "me too" or "piggy back" defense, echoing motions and objections of Mackay's attorney, rather than pursuing an independent defense, adverse to Mackay. A strong suggestion of intimidation by the trial judge who often expressed his impatience and bias with defense witnesses is present in the record (R. 236, 514).

His instructions to the jury were faulty and impermissibly weighted in favor of the Prosecution (R. 641-667) as will be more fully developed.

At the sentencing hearing, the pre-sentence probation report was entirely favorable to Petitioner. The Court failed to call the attention of the Petitioner to the Provision of *15 USC. § 78ff(a)* that no person shall be subject to imprisonment if he proves that he had no knowledge of such rule or regulation. (Rule 10b-5). Petitioner was assessed years of his total fifteen year sentence pursuant hat statute

without being notified by the Court or his attorney that his lack of knowledge of Rule 10b-5 would have resulted, if proven, in a fine rather than a prison sentence on those counts. Petitioner urged this point on the trial court when he appeared on March 8, 1974, in court in connection with the reconsideration of the sentence (A-24-26). The judge however refused to hear testimony and refused to reduce the sentence although the Court of Appeals found it "unconscionably excessive."

In summary, the record discloses that Petitioner was found guilty of criminal conduct after a trial lacking the essentials of due process and in the absence of proof of criminal intent. Under the strongest inference possible from the evidence, he was guilty only of association with Mackay and of exercising poor business judgment. *(Durland v. U.S.*, 161 U.S. 306, 40 L.Ed. 709, 16 S.Ct. 508).

FIRST QUESTION RESTATED: WAS PETITIONER CONVICTED AND SENTENCED WITHOUT DUE PROCESS TO CONSECUTIVE ONE YEAR TERMS ON EACH OF FIFTEEN COUNTS OF MAIL FRAUD AND SECURITIES FRAUD, PLUS A $27,000.00 FINE, IN THAT: (1) THE COURT'S INSTRUCTIONS WERE FAULTY AND IMPERMISSIBLY FAVORABLE TO THE PROSECUTION, AND (2) NO EVIDENCE, DIRECT OR CIRCUMSTANTIAL, WAS OFFERED FROM WHICH CRIMINAL INTENT COULD BE INFERRED?

ARGUMENT

The evidence is clear that Petitioner came on the scene in early July, 1969 *after* Mackay had concluded the definitive agreements and plan for the purchase of the Federated stock. He was immediately confronted with the flurry and rush of preparations for closing. Nothing in the record tends to prove that he devised a scheme or artifice to defraud (18 USCA, § 1341). Furthermore, there was no evidence, other than his association with Mackay, that he aided and abetted Mackay 'or Kaymac Industries, Inc., with knowledge that he was participating in a fraud or any type of criminal conduct. Again, there is no proof that he misrepres_nted or concealed a material fact in the connection with a purchase or sale of a security. There could have been no reliance as all principals involved in the transaction knew the pertinent facts. H. Smith Hagan, in particular, knew exactly the ramifications of the financing prior to the sale of Federated stock. (In re *Winship*, 397 U.S. 358; *Briggs v. Spaulding*, 141 U.S. 132, 11 S. Ct. 924).

Mackay represented Kaymac as "solvent" in the agreement introduced by the government (Pl. Ex. 4, App. A-61, paragraph 8.E.) and there is no evidence that Brewer did not believe this representation. The agreement also precludes reliance on any representations not set out therein (App. A-64, para. 15)).

The government's requested instructions were given virtually verbatim even to the extent of repeat-

ing one requested instruction twice. The government's requests Number 25 and 28 (TR 135, 139) were identical and both were included verbatim in the Courts instructions to the jury (R. 660-662). Also, the government admitted that it offered no evidence on paragraph 18 of Count I of the indictment (R. 576), the court nevertheless charged the jury (R. 656) that defendants were charged with failure to disclose to the Utah District Court that there were no free, clear and unencumbered mortgages assigned to Federated. This was in response to government's request No. 20 (R. Vol. VII, p. 130). Each of the government's requested charges, Numbers 1 through 33 (except No. 1-A) contained the handwritten notation "Given" (R. Vol. VII, 109-144). As to Mackay's requested charge Number two on *accomplice testimony* (R. Vol. VII, p. 149) the notation "Give D's #2" was made on government's requested instruction No. 33 (R. Vol. VII, p. 144). Presumably, the trial judge made the notations as he was the only one authorized to "give" instructions to the jury. If such presumption is correct, he inadvertently omitted the instruction requested by Mackay as to accomplice testimony. The requested instruction read as follows:

> *"DEFENDANT MACKAY'S REQUESTED INSTRUCTION NUMBER 2*
>
> "If you believe that any of the Government's witnesses were actual participants in the scheme alleged, then you should consider that testimony with great caution and scrutinize very carefully. On the other hand an accomplice is a competent witness in Federal court."

The notation "Given" appears on p. 149 of Vol. VII of the Record.

The court did give the "good faith" instruction (R. 660) requested by the government (TR 135), however, the defensive theory urged during the trial was not included in the instructions (R. Vol. VII, P. 135). Overall, then the instructions were prejudicially unbalanced and lopsided in favor of the government.

Exceptions to the court's charge (R. 670-667) were overruled.

The defensive theory was spelled out for the court at various times prior to the submission to the jury (R. 576-580). Mackay's Motion for Acquittal specifically set out the defensive theory (R. Vol. VII, p. 104). Basically, that theory was that Mackay, in good faith, believed that the $6,000,000 plus in mortgages were coming in to Federated free and unencumbered, thus giving a $1,500,000 excess in favor of Kaymac which provided a basis for the expenditures made by Mackay (R. 503-516). Defendant objected to the failure of the court to give the defensive theory instruction (R. 673-674; 677).

It was a further theory of the defense that government witnesses Hagan, Dorsey, Vedros, Joseph Kelly and Lee Mulder, knew full well the details of the financing and thus were "accomplices" (R. 224; 82-83; 92-93; 107; 169-170; 576-580; 166-167). 17 ALR Fed. 249.

The defensive theory needed to be spelled out as the case was a difficult one for a jury to understand.

The judge recognized the difficulty and expressed his intention "to help" the jury and comment on the evidence (R. 329). The instructions are particularly significant as any case against Brewer was a circumstantial evidence case. A defendant in a criminal case is entitled to adequate jury instructions on his theory of defense if there is evidence before the jury to reasonably support such theory. *(Beck v. U.S.*, 10th Cir., 305 F(2) 595, 599).

The judge also instructed the jury that witnesses are presumed to speak the truth (Government Requested Instruction No. 32, R. Vol. VII, p. 143; R. 663-664) but that such presumption could be outweighed by other factors. Where a case depends on the testimony of an accomplice, it is plain error to instruct in terms of a presumption that witnesses speak the truth. (*U.S. v. Birmingham*, 10th Cir., 1971, 447 F(2) 1313; *McMillen v. U.S.*, 1st Cir., 1967, 386 F(2) 29, 34-45, cert.den., 290 US 1031, 88 S.Ct. 1424, 20 L.Ed(2) 288). The error is compounded when a defendant, as Brewer did here, elects not to testify. See *Cupp v. Naughten*, No. 72-1148, 12/4/73, 42 LW 4029.

Also, in the absence of evidence, the jury was instructed that careless statements made without regard to their truth and without a reasonable basis for the purpose of obtaining money or property are fraudulent (R. 646). There was no evidence that any statement of Brewer's was careless or that he had the purpose of obtaining money or property. The instruction thus enlarged the definition of "fraudulent"

to enable the jury to conclude that he was guilty, though he may have made only a careless statement.

SECOND QUESTION RESTATED: WAS PETITIONER CONVICTED AND SENTENCED WITHOUT DUE PROCESS ON COUNTS 1, V, VI, VII, VIII AND IX WHEN (1) HE NEITHER COMMITTED NOR CAUSED TO BE COMMITTED ANY OF THE ACTS ALLEGED, APPARENTLY BEING CONVICTED ON A CONSPIRACY THEORY WHEN NOT CHARGED WITH CONSPIRACY, AND

(2) THE ACTS ALLEGED IN ALL OF SAID COUNTS, EXCEPT COUNT 1, WERE INCIDENTAL TO THE ALLEGED SCHEME RATHER THAN STEPS IN ITS EXECUTION?

ARGUMENT

The indictment is set out in the Appendix A-2754. *Count 1* is the universal count which essentially outlines the acts alleged by the government to constitute the violations of federal statutes. All acts alleged were for the benefit of Kaymac Industries, Inc. and Mackay as its controlling stockholder. Certain Federated checks were signed by Petitioner with Mackay, presumptively for corporate purposes, but after the purchase of Federated has been accomplished.

Count V relates to the mailing of a Federated letter signed by Mackay to a stockholder, John Grieder, while *Count VI* relates to the mailing on the same

date, August 13, 1969, of an identical letter to another stockholder, Paul Cotro-Manes, signed by Mackay. *Count VII* relates to the mailing on September 5, 1969, of an inter-office memorandum by Breeferd Large of Federated to Petitioner. *Count VIII* and *Count IX* relate to the mailing on October 18 and 20, 1969, of letters from Kaymac to Norman B. Smith of Federated enclosing stock certificates for transfer to Mackay.

Except for *Count I*, the universal count, there is no evidence whatever that Petitioner either committed or caused to be committed the act alleged in the said Counts. Nor is there proof that he aided or abetted the commission of such acts by Mackay or others. Violation of *18 U.S.C.A. §371 (the general conspiracy statute)* by the Petitioner is not charged in the indictment. Nevertheless, the trial judge, the prosecutor and the Court of Appeals apparently proceeded on the theory of conspiracy in sustaining the sentences on those counts. Witness the following dialogue between the trial judge and Mr. Mahoney, the prosecutor:

> *Mr. Mahoney:* Well, your honor, again, as I have mentioned, both defendants are named in all counts, and, once we have shown the scheme and the proof that these transactions are in furtherance of the scheme, even though Brewer may have done this one, it is usable against Mackay. The jury can consider all of the evidence.
>
> *The Court:* You are stating that very much more broadly than the law is, I think.

The act of one *conspirator* is indeed binding on another *conspirator* if that *cospirator* other conspirator has entered the *conspiracy* at the time of the act.

Mr. Mahoney: Right.

The Court: You are going to have to prove that Mackay had entered that *conspiracy* at the time this act was done by Brewer.

***

The Court: I don't believe we can take these counts separate from all the rest of the counts as far as proof of the *conspiracy* is concerned.

Mr. Mahoney: Precisely, your Honor.

The Court: I think all fifteen counts are going to have to be considered and the evidence received under all fifteen counts to determine, first, whether there is a *conspiracy* and to determine, second, when Mackay got into it and when Brewer got into it, and then what is done by Mackay and what is done by Brewer after they are both in that *conspiracy* is binding upon both of them. (R. 331-333).

The following exchange took place between the Court and Mr. Herridge, Petitioner's trial attorney:

Mr. Herridge: Your Honor, on behalf of defendant Brewer, I would like to point out that there is nothing whatsoever which relates him to that letter involved there.

The Court: Well, every little piece of evidence in a *conspiracy* doesn't need to relate to each one of them. (R. 325, §22 to R. 326, L.1) (EMPHASIS SUPPLIED).

The sentences for the 4 Counts should be set aside and held for naught. This Court "has repeatedly

warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets of conspiracy prosecutions." *Gruenewald v. U.S.*, 353 U.S. 391, 404. Here the government has succeeded in broadening the conspiracy laws in the absence of a charge that such law was violated.

There is a sound additional reason why the sentences on Counts V, VI, VII, VIII and IX should be dismissed and set aside. The acts alleged in those counts were incidental to any alleged scheme and followed the accomplishment of the purchase of the Federated stock which was completed on July 30, 1969. *U.S. v. Maze*, 94 S. Ct. 645.

THIRD QUESTION RESTATED: WAS PETITIONER CONVICTED AND SENTENCED WITHOUT DUE PROCESS WHEN HE WAS ASSESSED FIFTEEN SENTENCES FOR WHAT WAS ONE TRANSACTION?

ARGUMENT

Essentially the government alleged one fraudulent scheme by its indictment but broken down into 15 segments called counts. This procedure ordinarily increases the exposure of the defendant and encourages plea bargaining. Usually, the government is willing to accept a guilty plea on one count and dismiss the others in the belief that justice will be done and prosecutorial expense saved. The defendant pleading not guilty assumes the risk of multiple convictions, as in this case. Here, consecutive sentences

on each count were imposed, requiring anaiysis of each count to assure that it constitutes a separate violation of federal law. While the indictment is extremely difficult to interpret, a fair reading leads to the conclusion that the alleged scheme was to buy Federated using its own securities to accomplish the purchase. This was accomplished on and before July 30, 1969, by Kaymac acting through its President, Mackay. What happened afterwards was the result of the alleged scheme, not acts in its execution. Counts II through IX allege acts taking place July 30 through October 20, 1969. (*U.S. v. Maze*, 94 S.Ct. 645) Counts X and XI allege commercial airline flights by various participants travelling to Utah where the closing was to take place on July 30, 1969. Counts XII and XIII relate to the mailings of Federated securities. Count XIV relates to the telegraphic transfer of money, and Count XV relates to the air transportation of the $6,036,727.92 worth of mortgages to Federated on August 20, 1969. The acts charged in Counts X through XV (the securities fraud counts) describe only acts incidental to the same scheme allegec in the mail fraud counts (Counts I through IX)). No act alleged is per se fraudulent.

The Court however instructed the jury that each separate use of the mails or instrumentality of commerce as alleged in Counts X through XV was a separate offense. (R. 658, L. 21-23) The gist of the crime however is the fraud, and the mailing or use of commerce is incidental. If there had been six fraudu-

lent schemes and a use of the mail to implement each, the six counts would have been proper. However, the use of the mail requirement is solely to create federal jurisdiction. Counts X through XV should be dismissed as each fails to allege a separate offense. If the Court be persuaded however that an offense of security fraud is alleged, then it must be crystal clear that only one fraudulent scheme is involved and five counts of the six must be dismissed on the ground that they do not involve a separate offense. *Sanders v. U.S.*, 415 F(2) 621(5th Cir. 1969). *U.S. v. Dioguardi*, 492 F(2) 70, 83, *Bell v. U.S.*, 349 U.S. 81, 75 S.Ct. 620., *U.S. v. Universal CIT Credit Corp.*, 344 U.S. 218, 220-221, 229, 73 S.Ct. 227, 97 L.Ed.260, *U.S. v. Laub*, 385 U.S. 475, 87 S. Ct. 574, 17 L.Ed.(2) 526(1967).

The government has created fifteen crimes when it alleges only one actual criminal episode. To permit this mockery to stand would encourage a practice which can only bring disrepute upon the judicial system.

FOURTH QUESTION RESTATED: WAS THE COURT OF APPEALS WITHOUT AUTHORITY TO REDUCE THE SENTENCE IT FOUND TO BE "UNCONSCIONABLY EXCESSIVE" AFTER THE TRIAL JUDGE REFUSED TO REDUCE THE ORIGINAL SENTENCE?

ARGUMENT

The 15 year sentence and $27,000 fine was "unconscionably excessive" according to the Court of Appeals (App. A-8-10). Chief Judge Ritter, the trial judge, refused upon reconsideration to alter the original sentence, filing a memorandum opinion to that effect (App. A-11-17). The Court of Appeals felt it was unauthorized to change or reduce the sentence. This holding is in conflict however with the Eighth Circuit holding in *WOOSLEY V. U. S.*, 478 F(2) 139 (1973). That court held that a Court of Appeals has the power to review the severity of a criminal sentence within narrow limits where the court has manifestly or grossly abused its discretion. The Court pointed out it has the power of review where the sentence was imposed on a mechanical basis. The judge there referred to "my policy" in the sentencing proceeding. Here, Judge Ritter, in the sentencing proceeding referred to his "habit and practice" of imposing severe sentences in fraud cases:

> "It is my view that I would violate my oath to support and defend the Constitution of the United States and the laws if in these offenses I didn't impose severe sentences. And I have been in the habit of doing that. That is my practice here. The only question is how severe. I am going to impose prison terms." (App. A-73).

He too was imposing a sentence on a mechanical basis rather than on an individualistic basis.

No justification is found in the record for assessing the excessive sentence and fine. The pre-sentence pro-

bation report was entirely favorable to Petitioner (App. A-68-69). Under the total circumstances, the sentence and fine was a classic example of what writers have referred to as *"Anarchy of Sentencing in Federal Courts"* It is contrary to the published *Criminal Justice Standards.* (Zumwalt, *Judicature*, Vol. 57, Number 3, Oct. 1973). These call for more discriminate use of long sentences and consecutive sentences are discouraged. Consecutive sentences are authorized only in cases where confinement for such terms is found necessary to protect the public from further criminal conduct by the defendant. Fines are recommended as appropriate for felonies only in the case where the defendant has gained money or property through the commission of the offense. (*Judicature*, Vol. 55, Number 9, May 1972, PP. 373, 374. See also *Model Sentencing Act*, Article V, § 22; *Multiple Charges, Judicature*, Volume 57, Number 3, October 1973, PP. 107). The trial judge's apparent reliance on parole to reduce his 15 year sentence to a 5 year sentence is manifestly improper.

28 U.S.C.A. 2106 appears to grant authority to review the severity of sentences. It follows:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree or order, or require such further proceedings to be had as may be just under the circumstances. June 25, 1948, c.646, 62 Stat. 962."

This court said in *Warden v. Marrero*, No. 73-831, 6/19/74, 42 LW 4944 at p. 4960, "Parole eligibility is determined by a parole board at its discretion, and the existence of parole eligibility is either guaranteed by statute or, as in the case of the repealed Act, is denied by statute. One thing is clear: the sentencing judge has no explicit control over the determination." If trial judges are to determine how long they want a defendant to serve, and multiply that number by three, we have reached "Never, Never Land" in federal sentencing. The judge's remarks in his Opinion about fraud cases shows his deeply ingrained bias in fraud cases. It should be apparent from the entire record that this bias has contaminated the quality of the trial afforded the Petitioner. Accordingly, it would be appropriate for the excessive sentence to be set aside and the cause remanded for a new trial.

CONCLUSION

Petitioner prays that a Writ of Certiorari be issued to the Court of Appeals, Tenth Circuit, reversing its judgment and that of the trial court, and directing that Petitioner receive a new trial.

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CERTIFICATE OF SERVICE

I certify that I have served a copy of the foregoing Petition for Writ of Certiorari on the following persons by mailing each a copy of such Motion, postage prepaid, this 24th day of July, 1974:

The Solicitor General of the United States

Mr. Robert G. Mahony, U.S. Department of Justice

Mr. Robert G. Gottlief, Securities and Exchange Commission

Mr. C. Nelson Day, U.S. Attorney, Salt Lake City, Utah

William F. Billings
Attorney for Chester Brewer,
Petitioner

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UNITED STATES of America, Plaintiff-Appellee,

v.

Richard MACKAY and Chester Brewer, Defendants-Appellants.

Nos. 73-1328, 73-1329.

United States Court of Appeals, Tenth Circuit.

Argued and Submitted Oct. 16, 1973.

Decided Dec. 6, 1973.

Rehearing Denied Feb. 4, 1974.

Defendants were convicted in the United States District Court for the District of Utah, Willis W. Ritter, Chief Judge, of violation of mail fraud and securities fraud statutes and sentenced to a total of 15 years' imprisonment, and they appealed. The Court of Appeals, William E. Doyle, Circuit Judge, held, inter alia, that evidence that defendants, acting through a corporation, conceived a scheme to gain control of an insurance company by using its own assets for the purposes of purchasing its stock and that of another insurance company, using facilities of interstate commerce in the process, supported defendants' convictions; that defendants were not deprived of a speedy trial even though 18 months intervened between the return of the indictments and their trial; that no prejudice resulted from the court's instructions on accomplice testimony; that various remarks of the trial court were not prejudicial; that the court's instructions to the jury were proper, and that the sentences were not excessive.

Affirmed.

1. Post Office ⇐35(2)

Essentials of mail fraud are proof of scheme to defraud plus use of mails to execute or further scheme or design. 18 U.S.C.A. § 1341

2. Securities Regulation ⇐327

Offense of securities fraud requires proof of scheme or design to defraud incident to purchase or sale of security, and use of instrumentality of interstate commerce or of mails in furtherance of that scheme or design. Securities Exchange Act of 1934, §§ 10(b), 32, 15 U.S.C.A. §§ 78j(b), 78ff.

3. Securities Regulation ⇐323

Each use of mails or instrumentality of commerce to effectuate securities fraud constitutes separate crime even though it relates to essentially same fraudulent scheme. Securities Exchange Act of 1934, §§ 10(b), 32, 15 U.S.C.A. §§ 78j(b), 78ff.

4. Securities Regulation ⇐324

In order to be guilty of securities fraud, accused need not himself carry out mailing or use of instrumentality of commerce, but it is sufficient if he causes it to be carried out by setting forces in motion which foreseeably result in use of mails. 18 U.S.C.A. § 1341; Securities Exchange Act of 1934, §§ 10(b), 32, 15 U.S.C.A. §§ 78j(b), 78ff.

5. Post Office ⇐49(11)
Securities Regulation ⇐328

Evidence that defendants, acting through corporation, conceived and implemented scheme to gain control of insurance company by using its own assets for purpose of purchasing its stock and that of another insurance company, all for fraudulent purposes and with use of mails and other instrumentalities of interstate commerce, supported defendants' convictions of mail and securities frauds. 18 U.S.C.A. § 1341; Securities Exchange act of 1934, §§ 10(b), 32, 15 U.S.C.A. §§ 78j(b), 78ff.

6. Criminal Law ⇐1118

Where record contained no information indicating that witnesses for defense had been lost because of delay in trial, allegations that such was case would not be considered on appeal in connection with contention that defendants had been prejudiced by being deprived of speedy trial.

7. Criminal Law ⇐573

Factors to be considered in determining whether constitutional right to speedy trial has been violated include

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length of delay, reasons for delay, whether defendant asserted his right and whether there was actual prejudice. U.S.C.A.Const. Amend. 6.

6. Criminal Law ⇐573

Defendants were not denied right to speedy trial by delay of 18 months between return of indictment and trial where prosecution was complex one for mail and securities fraud, right was not asserted until it was time to go to trial, and no prejudice to defendants was evident. 18 U.S.C.A. § 1341; Securities Exchange Act of 1934, §§ 10(b), 32, 15 U.S.C.A. §§ 78j(b), 78ff, U.S.C.A.Const. Amends. 5, 6.

9. Criminal Law ⇐811(1)

Where trial court at completion of jury charge asked counsel to stipulate that exceptions could be taken after jury retired and to further stipulate that those exceptions were deemed to be taken in "conformity to the rule," procedural deficiency in objections by defense counsel to jury charge would be disregarded. Fed.Rules Crim.Proc. rule 30, 18 U.S.C.A.

10. Criminal Law ⇐1173.2(6)

Where testimony furnished by accomplice witnesses made little contribution to case because important elements of crimes of which defendants were accused were adequately shown by other evidence, and basic facts of case were not disputed by defendants, they were not prejudiced by failure of court to instruct on accessory testimony.

11. Criminal Law ⇐1035(8)

Remarks by trial court, including remark to defense counsel that court wanted him to forget examination in which he was engaged and direction to witness to answer question "without beating around the bush," did not constitute plain error or prejudice defendants. Fed.Rules Crim.Proc. rule 52(b), 18 U.S.C.A.

12. Criminal Law ⇐655(5)

Court may reprimand or rebuff counsel when necessary to maintain control of proceedings.

13. Criminal Law ⇐790

Court's charge to jury explaining nature of grand jury indictment was not subject to interpretation that it improperly suggested that defendants had already been convicted by grand jury.

14. Criminal Law ⇐1172.2

In prosecution for mail and securities fraud, comments in charge to jury as to reassignment of mortgages as part of fraudulent scheme was not prejudicial as invading province of jury.

15. Criminal Law ⇐1172.6

Passing remark by court in jury instructions, unsupported by evidence, which incited district court as one of victims of alleged mail and securities fraud was not prejudicial.

16. Criminal Law ⇐822(7)

Where, in prosecution of defendants for mail and securities fraud, court gave clear instructions on presumption of innocence, burden of proof, use of circumstantial evidence, exculpatory nature of good faith, meaning of "knowingly" and "willfully," and what constitutes requisite intent in fraud cases, instruction stating that jury could infer intent from circumstantial evidence was not prejudicial to defendants. 18 U.S.C.A. § 1341.

17. Post Office ⇐35(11)
Securities Regulation ⇐323

Activities tantamount to fraud, for purposes of mail fraud and securities fraud statutes, include making statements without regard to whether they are true or false; making statements without reasonable basis; making statements of fact implying knowledge where there is no knowledge; making expressions of opinion where speaker has no opinion in fact, and making promises recklessly without reasonable basis for belief that they can be fulfilled. 18 U.S.C.A. § 1341; Securities Exchange Act of 1934, §§ 10(b), 32, 15 U.S.C.A. §§ 78j (b), 78ff.

18. Fraud ⇐68

Making of statement which is either patently false or made with reckless indifference to its truth or falsity can be equivalent to intent to defraud.

19. Criminal Law ⇐1208(3)

So long as sentence does not exceed maximum limits, it is not illegally excessive.

20. Criminal Law ⇐1183

Federal appellate courts do not have authority to review sentences.

21. Criminal Law ⇐1181

On Motions for Rehearing

Defendants' 15 consecutive one-year sentences, imposed after conviction for violation of securities and mail fraud statutes, were unconscionably excessive, and case would therefore be remanded to trial court for reconsideration of sentences. 18 U.S.C.A. § 1341; Securities Exchange Act of 1934, §§ 10(b), 32, 15 U.S.C.A. §§ 78j(b), 78ff; Fed.Rules Crim.Proc. rule 35, 18 U.S.C.A.

Robert G. Mahony, Atty., Dept. of Justice (C. Nelson Day, U. S. Atty., D. Utah, on the brief), for plaintiff-appellee.

Philip I. Palmer, Jr. of Palmer, Palmer & Coffee, Dallas, Tex. (Jimi Mitsunaga of Mitsunaga & Ross, Salt Lake City, Utah, on the brief), for defendant-appellant Richard Mackay.

William F. Billings of Johnson, Guthrie & Billings, Dallas, Tex., for defendant-appellant Chester Brewer.

Before PICKETT, SETH and DOYLE, Circuit Judges.

WILLIAM E. DOYLE, Circuit Judge.

The cause before us is a criminal prosecution in which the defendants Mackay and Brewer were charged with and convicted of violation of the mail fraud and securities fraud statutes. They were charged in nine counts with violation of 18 U.S.C. § 1341, using the mails to defraud, and in six counts of violating 15 U.S.C. § 78j(b) and 15 U.S.C. § 78ff. The jury convicted on all counts. The judge sentenced each of the defendants to one year on each of the 15 counts, or a total of 15 years to run consecutively, and fined each of them $27,000.

There are numerous allegations in Count I, the definitive count of the indictment, but the basic facts which are relied on by the government to establish the fraud are those pertaining to the obtaining of control of Federated Security Insurance Company and Transwestern Life Insurance Company and the stripping of Federated of its assets for the purpose of purchasing its stock. The defendants' corporation, Kaymac Industries, Inc., was used for the purpose of negotiating and acquiring the mentioned interests. The indictment charged the defendants with conceiving a scheme to defraud the policyholders, claimants, creditors and minority shareholders of Federated by borrowing $3,000,000 from Dorsey and Company, a New Orleans, Louisiana brokerage firm.

The basic facts surrounding the execution of the scheme are not disputed. Dorsey and Company advanced $3,000,000 for a very short period of time to permit the purchase of 519,400 shares (93 percent) of Federated stock to be transferred to Kaymac corporation. Soon after the stock was transferred the assets of Federated were assigned to Dorsey and Company. This occurred during the latter part of July 1969. The total purchase price was $3,000,000. This sum was paid in cash to one H. Smith Hagan, President of Oregon National Life Insurance Company, the parent company of Transnational Service Corporation which owned the controlling stock of Federated. As part of the transaction, Hagan received an additional $790,000 in mortgages owned by Federated for his sale to Kaymac of the block of Transwestern stock he held.

Dorsey and Company had insisted that the assets of Federated which Mackay had authorized Dorsey to sell had to be replaced, and so in July 1969 an arrangement was made with a New York company, United Housing Corporation of New York, to purchase 4.5 million dollars in government mortgages. In turn, these mortgages were reassigned to United as security for the sale and Brewer and Mackay executed promissory notes for

4.5 million dollars and at the same time obligated Federated to repurchase the notes in the event of default by Kaymac, the primary obligor, in the purchase of the mortgages.

On July 30, 1969, the purchase of the Federated stock was completed for $5,000,000 in cash which was advanced temporarily by Dorsey and Company. Following this closing Dorsey sold the portfolio of Federated and recouped the $5,000,000 plus interest. Federated received back $531,000 of the excess from the sale of the bonds. Dorsey and Company received a very substantial commission. Most of the $531,000 just mentioned was used by defendants to purchase Transwestern stock for Kaymac.

The defendants maintain that as a result of all these financial maneuvers Federated had not suffered, that its assets had actually increased. They also point to the fact that the exchange of assets was approved by the Insurance Commissioner for the State of Utah. The difficulty is that Federated was legally responsible to pay for the mortgages purchased, and Federated's title was a naked legal title which was wholly lacking in equity and in substance.

Apart from this alleged scheme to defraud there are many further allegations in the indictment showing specific dispositions of cash of Federated to pay obligations of Kaymac and of the defendants personally.

The briefs contain numerous contentions. These contentions include 1) the question of sufficiency of the evidence to support the various allegations in the indictment, 2) the alleged denial of a speedy trial, 3) the alleged errors in giving and failing to give instructions, 4) it is also argued that the remarks of the trial judge during the trial constituted reversible error, and, finally, it is argued that the sentences were improper.

I.

SUFFICIENCY OF THE EVIDENCE

[1-4] In considering whether the evidence is legally sufficient, it must be viewed in a light most favorable to the prosecution. The evidence is not to be weighed nor is it permissible for this court to consider the credibility of the witnesses. The essentials of mail fraud are proof of a scheme to defraud plus the use of the mails to execute or further this scheme or design. The offense of securities fraud is quite similar in that it also calls for proof of a scheme or design to defraud incident to the purchase or sale of a security. Here again, there must be the use of an instrumentality of interstate commerce or of the mails in furtherance of that scheme or design. The jurisdictional basis is, of course, the use of the mails or an instrumentality of commerce and as such each mailing is regarded as a separate crime even though it relates to essentially the same fraudulent scheme.[1] It is also fundamental that an accused need not carry out the mailing or use of an instrumentality of commerce. If he causes it to be carried out by setting forces in motion which foreseeably result in use of the mails his action is sufficient. *See* Marvin v. United States, 279 F.2d 451 (10th Cir. 1960).

[5] From a consideration of the evidence briefly sketched above, it is amply clear to us that Mackay, acting through Kaymac Industries, conceived a scheme to gain control of Federated by using its own assets for the purpose of purchasing its stock and for the purpose of purchasing for Kaymac stock in Transwestern. It is also clear that he used the assets of Federated to pay debts of Kaymac and to pay his own debts.

There is other fraudulent activity. It was represented to the broker who sold the Federated assets that these assets were being replaced when in fact the replacement was an insubstantial transac-

1. Badders v. United States, 240 U.S. 391, 36 S.Ct. 367, 60 L.Ed. 706 (1916). Micieli v. United States, 142 F.2d 480 (10th Cir.), cert. denied, 323 U.S. 747, 65 S.Ct. 49, 89 L.Ed. 598 (1944).

tion since Federated was required to somehow repay Kaymac for the purchase of the replacement assets of the mortgages.

The evidence also establishes that Brewer was a participant. He was present during the time period alleged in the indictment, either performing some steps himself or participating with Mackay. Although the evidence at trial was circumstantial, the inferences to be drawn from the basic facts strongly supported the existence of a design to obtain Federated assets for the purpose of making available cash to Mackay to the detriment and prejudice of the minority shareholders and the claimants and shareholders of Federated. The use of misrepresentation and the withholding of information to carry out the fraudulent purposes were adequate. The hope or even the belief that these manipulations would ultimately succeed is, of course, not a defense. Sparrow v. United States, 402 F.2d 826 (10th Cir. 1968). Furthermore, the evidence establishes the uses of the mails or instrumentalities of commerce incident to the carrying out of the scheme.[2]

II.

THE ALLEGED SPEEDY TRIAL DEPRIVATION

[6] The indictment was returned on July 23, 1971, and the trial took place in December 1972. The defendants did not demand a trial. However, the defendant Mackay moved to dismiss the indictment just prior to the trial on December 1, 1972. In that motion he alleged prejudice growing out of the delay between the time that the offense was alleged to have been committed and the time of trial. He stated that the period was two years. He also alleged prejudice due to delay in bringing the case to trial for a period of 18 months. He now maintains that some witnesses who would have purchased the Federated and Transwestern corporations had been lost. This fact does not appear anywhere in the record and therefore is not entitled to any consideration.

The cause was set for trial on two occasions and the second time neither the government nor the defendant was ready and both joined in the motion for a continuance.

[7] The standards prescribed by the Supreme Court in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972), are 1) the length of the delay; 2) reasons for the delay; 3) whether the defendant asserted his right; and 4) whether there was actual prejudice. These, of course, are not exclusive but are to be considered in relationship to any other evidence that might be relevant.

[8] The length of time is not great in view of the fact that the cause is a complex mail fraud-securities fraud prosecution which calls for extensive and careful organization and preparation. The defendant, as noted above, did not assert his right until it came time to go to trial. In view of this, the inference to be drawn is that his main purpose was

2. Counts I through IV involved mailings of the control stock of Federated or the assets of Federated. Counts V and VI involved mailing of "lulling letters" by defendants to minority shareholders of Federated, informing them of a change in ownership and painting a rosy picture of the future of the company. Count VII involved an interoffice memo mailed by an outside consultant or assistant who was temporarily brought to Federated to "square away" the take over which defendants were still in the process of consummating. Counts VIII and IX alleged mailings of the control stock certificates of Federated from Kaymac in Dallas to Federated's headquarters for final transfer of the stock shares into Mackay's name. Counts X, XI and XV were based on use of aircraft flights in furtherance of the scheme. X and XI involved flights to Salt Lake City by participants in the contemplated transaction which would consummate the sale of the Federated and Transwestern stock to Mackay and/or Kaymac. Count XV involved a flight transferring the purported mortgage assignments to Federated from Dallas to Salt Lake. Counts XII and XIII involved mailings of Federated's assets to brokers for resale, and count XIV involved a telegraphic transmission of $80,000 of Federated money to United Housing to facilitate the mortgage assignment facet of the overall scheme.

to make a record. In short there are manifest reasons for the delay in terms of the difficulty of the task involved.

Finally, we see no prejudice to the defendants. Accordingly it is not a case in which there has been a violation of the Fifth or Sixth Amendments. Cf. United States v. Wilson, No. 73-1247 (10th Cir., October 4, 1973). *See also* Barker v. Cronse, 426 F.2d 541 (10th Cir. 1970); Dukes v. Florida, 398 U.S. 30, 90 S.Ct. 1564, 26 L.Ed.2d 26 (1970); and see the concurring opinion of Mr. Justice Brennan in this latter case.

[8]

THE FAILURE TO INSTRUCT ON VIEWING THE TESTIMONY OF AN ACCOMPLICE WITH CAUTION

[9, 10] Defendants' objection to the failure of the court to instruct on accessory testimony was very general in form. In fact, no specific mention was made of failure to instruct on this subject. Ordinarily this would rule out consideration of the contention (in accordance with Rule 30). In this instance, however, there was little opportunity to object. The judge at the completion of the charge asked counsel to stipulate that the exceptions could be taken after the jury retired and to further stipulate that these exceptions were deemed to be taken in "conformity to the rule." In view of this questionable action on the part of the trial court, it would be unfair to hold defendants to a strict observance of Rule 30. Hence if the failure to give the instruction were to be regarded as prejudicial, the procedural deficiency should not and would not enter into this court's decision. Furthermore, the fact that the instruction was an inadequate one which did not fully state the law (and it was) should not furnish a justification for the trial court's failure to charge on this subject. Nevertheless, we are of the opinion that the failure to instruct was not reversible error. True, the witnesses in question, Dorsey and Hagan, were not directly involved in the formulation and engineering of the scheme to defraud. They did, however, have a participation whereby it was arguable that they were accomplices. Cf. Beatty v. United States, 356 F.2d 19 (10th Cir. 1966); and Hull v. United States, 324 F.2d 817 (5th Cir. 1963).

The main reason for our conclusion that the failure to give the instruction does not call for reversal is that the testimony furnished by the witnesses in question made little contribution to the case because the central scheme, that of purchasing the stock of Federated with Federated's funds, was the heart of the scheme and an adequate basis for the charge and the conviction, and this was established by documents and other evidence. So, therefore, the case was not dependent on the so-called accomplice testimony. *See* United States v. Owens, 460 F.2d 268 (10th Cir. 1972); United States v. Birmingham, 447 F.2d 1311 (10th Cir. 1971); and *compare* United States v. Plemons, 455 F.2d 243 (10th Cir. 1972). There we upheld the conviction, notwithstanding that there was no accomplice instruction and we did so because of strong corroborative evidence (there also, however, the defendant had not requested the instruction.)

One further factor is that the defendants do not dispute the basic facts in the case. There is no question about Mackay having promoted and carried out the transaction with the help of Brewer.

From a study of the entire record it clearly appears that the conviction is based upon the whole scheme and not any incidental misrepresentations made to Dorsey or Hagan which testimony strikes us as being superfluous.

Considering, then, the magnitude of the fraudulent scheme, we find it impossible to conclude that the trial court's failure to compose and give an instruction on accomplice testimony justifies a reversal of the convictions.

IV

THE ALLEGED PREJUDICE STEMMING FROM REMARKS OF THE TRIAL COURT

Although an extensive appendix of remarks of the trial court during the trial appears in the brief, only one of these was objected to. Thus, as to the

others, it would have to appear that the particular remark or the remarks considered together constitute plain error. Rule 52(b). United States v. Wheeler, 444 F.2d 385 (10th Cir. 1971); Warden v. United States, 391 F.2d 747 (10th Cir. 1968).[3]

[11] The comment of the court which is shown above was directed not only to the examination of counsel for the defendant, but also to the examination of government counsel. While this comment did not serve any purpose and was undoubtedly intended to be humorous, we fail to see it as being prejudicial to the rights of the accused. If, of course, the judge had evidenced hostility or bias the question would assume different proportions. *See* Lowther v. United States, 455 F.2d 657 (10th Cir. 1972); *cf.* United States v. Wheeler, *supra*. We fail to see plain error in the trial court's admonition to the defendant Mackay to "answer that question without beating around the bush." This is within the court's province. Deschenes v. United States, 224 F.2d 688 (10th Cir. 1955).

[12] Indeed, the trial court may even reprimand or rebuff counsel when necessary to maintain control of the proceedings. Whitlock v. United States, 429 F.2d 942 (10th Cir. 1970). United States v. Gleeson, 411 F.2d 1091 (10th Cir. 1969).

Finally, the judge's comments on the evidence were not plain error when read in proper context, since the charge as a whole defines the jury's role as the finder of facts.

V

OTHER OBJECTIONS TO INSTRUCTIONS

In addition to the accessory instruction the defendants raise a number of other objections to instructions.

[13] First, they complain that the trial judge in explaining the nature of the grand jury indictment suggested that the defendants had already been convicted by the grand jury. We disagree with this interpretation. The court explained that the indictment was merely a charge or accusation, was not evidence and was not to be considered as evidence in the case.

[14] Second, it is contended that the judge's comment in the charge as to reassignment of the mortgages originally assigned to Federated invaded the province of the jury. The important factor here is that the documents in the record support the judge's comment as to reassignment. The defendants do not deny the effect of these documents but say that the reassignments were merely formal. No prejudice is shown.

[15] We have also considered the numerous other objections including defendant Brewer's exception to the trial court's description of the indictment charging "failing to disclose to the broker in New Orleans, Transnational Service Corporation and Oregon National Insurance Company, as well as the District Court of the Third Judicial District, Salt Lake City, Utah, that there were no free, clear and unencumbered mortgages assigned to Federated." The mention of the district court as one of the victims is, it is true, unsupported by evidence; the reference, however, was a passing one which does not appear to us to be harmful.

[16] Defendants have also taken exception to that part of the instruction stating that the jury could infer intent from circumstantial evidence. This type of instruction, or instructions similar to it, have been criticized as improperly shifting the burden of proving intent from the government to the defend-

3. The particular remark as it appears in context reads as follows:

BY MR. PALMER:

Q. Mr. Kelly, I have forgotten what I was asking you when we broke for lunch so I am going to forget that line.

THE COURT: *I want to forget the whole examination.*

MR. PALMER: Beg pardon?

Your Honor, I would like for the record at this time to move for a mistrial upon the grounds that the judge's comments on the weight of the evidence is prejudicial to my client.

ant. Our court has been critical of the instruction, but has not held it to be prejudicial when the charge as a whole sufficiently emphasizes that the burden of proof is on the prosecution, and that the jury must actually conclude that defendant had the requisite intent, even though established by circumstantial evidence. United States v. Parker, 469 F.2d 884, 895 (10th Cir. 1972); McCarty v. United States, 409 F.2d 793, 800 (10th Cir.), cert. denied, 396 U.S. 836, 90 S.Ct. 95, 24 L.Ed.2d 87 (1969). *See also* United States v. Woodring, 464 F.2d 1248, 1251 (10th Cir. 1972); United States v. Tijerina, 407 F.2d 342, 355 (10th Cir. 1969). Since the judge gave clear instructions on presumption of innocence, burden of proof, use of circumstantial evidence, exculpatory nature of good faith, meaning of "knowingly" and "wilfully," and what constitutes the requisite intent in fraud cases, it cannot be said that the embattled portion was prejudicial to defendants.

(17, 18) We at last consider Brewer's objection to the instruction covering statements made recklessly being tantamount to fraudulent ones. This lengthy instruction discusses statements made without regard to whether they are true or false; statements put forth without a reasonable basis; statements of fact implying knowledge where there is no knowledge; expressions of opinion where the speaker has no opinion in fact; and promises made recklessly without reasonable basis for belief that they can be fulfilled. Insertion of the word careless does not, in our view, render the instruction erroneous because its whole thrust is conduct and activity which are tantamount to fraud. Defendant says that the law requires that a statement made recklessly must also be patently false. We disagree. The law is that a statement made which is either patently false or made with reckless indifference to its truth or falsity can be equivalent to intent to defraud. Eibel v. United States, 364 F.2d 127, 134 (10th Cir. 1966); Gusow v. United States, 347 F.2d 755, 756 (10th Cir. 1965).

VI

THE ALLEGED EXCESSIVENESS OF THE SENTENCE

Defendants finally contend that the sentence is so patently excessive as to require relief.

At the time of sentence the judge noted the prevalence of fraud cases within the Utah district and cited this as a reason for imposing 15 consecutive one-year sentences plus substantial fines. The defendants maintain that there was essentially one offense and a number of mailings or uses of the instrumentalities of interstate commerce and that the cause should be treated as a single offense.

In an early decision in this Circuit, Mitchell v. United States, 142 F.2d 480 (10th Cir. 1944), this identical question was before our court. A mail fraud indictment had eight counts which charged a continuing scheme to defraud. The court held that this did not constitute one continuing crime but that each and every mailing was a distinct execution of the central scheme.[4] So also in our

4 The discussion in *Mitchell* is as follows:

> It is of course true that an offense of a continuing duration cannot be arbitrarily divided into separate and distinct offenses by the disposition of the prosecutor and the grand jury to divide it into separate elements of time. . . . But we have quite a different situation. The crimes charged in each count constitute one continuous scheme to defraud, the same scheme is alleged in each count of the indictment, and the offense charged in each count has its genesis in the continuing scheme to defraud. But the gist and crux of the offense is the use of the mails in the execution of the scheme; it is the use of the mails for the purpose of executing the scheme which gives the federal courts jurisdiction over the offense. . . . The plain distinction lies in the difference between one continuing offense which may be consummated by a single or plural acts over a period of time . . . and an indictment which alleges a continuing scheme and artifice to defraud, which is made criminal under the law each and every time the mail is used in execution thereof, and only when and if the mails are used.
>
> 142 F.2d at 481.

cause each separate use of the mails is a separate offense. Similarly, the repeated violation of the Securities Act is subject to the same doctrine. *See* Palmer v. United States, 229 F.2d 861 (10th Cir. 1955), cert. denied, 350 U.S. 996, 76 S.Ct. 546, 100 L.Ed. 861 (1956). The constitutionality of the multiple count approach in mail fraud cases has been upheld by the Supreme Court. Badders v. United States, *supra*.

[19] We have repeatedly held that so long as the sentence is valid, that is, does not exceed maximum limits, it is not illegally excessive. Smith v. United States, 273 F.2d 462 (10th Cir. 1959); Edwards v. United States, 206 F.2d 865 (10th Cir. 1953).

[20] Federal appellate courts do not have the authority to review sentences, although there have been instances in which this power has been undertaken. *See, for example,* United States v. Wilson, 450 F.2d 495 (4th Cir. 1971); Marano v. United States, 374 F.2d 583 (1st Cir. 1967); United States v. West Coast News Co., 357 F.2d 855 (6th Cir. 1966); United States v. Wiley, 278 F.2d 500 (7th Cir. 1960).

There is an avenue open to the defendant and that is to move pursuant to Rule 35 of the Federal Rules of Criminal Procedure for a reconsideration of the sentence. The trial court may take a different view at this later stage in the proceedings. We, however, lack legal authority to interfere with the sentences imposed and we are not disposed to employ fiction to achieve a result.

We deem it unnecessary to discuss the many other points raised in the briefs. All matters having a semblance of merit have been examined and listed.

The judgment of the district court is affirmed.

COMMENTS ON THE MOTIONS FOR REHEARING

The motions for rehearing of both defendants advance several contentions. We consider several but not all of these contentions. The defendant Brewer objects to several statements in the opinion such as the reference to "defendants' corporation." Brewer was secretary-treasurer of Kaymac and he had signed on its behalf. *See, for example,* the Government's Exhibit 25-C, dated August 27, 1969, an assignment on behalf of Kaymac Industries.

Brewer claims that he did not execute promissory notes to United Housing. He did, however, on August 12, 1969, execute an assignment to Peoples Bond and Mortgage Company incorporating a letter from Kaymac to United Housing. That letter stated that "Kaymac Industries, Inc. shall cause Federated Security Insurance Company to execute and *deliver reassignments* of the mortgages assigned under the letter agreement executed this date and referred to herein." Although Brewer may not have actually executed the promissory notes reassigning the mortgages to United Housing, he was active and directly a participant in fact in the reassignment.

Both Mackay and Brewer object to the charge involving 15 counts in a transaction which is essentially one big continuing transaction. We have been referred to United States v. Maze, 603 U.S. —, 94 S.Ct. 645, 38 L.Ed.2d — (1974), wherein it was held that the mailings were remote from the transactions described in the indictment. The *Maze* decision does not rule this case.

We have considered all the other contentions pertaining to liability and feel that they are lacking in substance. If we were able to pursue form and ignore substance, they might have some persuasive force. This, of course, we cannot do, and from a consideration of the record we are unable to agree that Brewer was in effect an uninformed bookkeeper.

[21] The defendants argue that the consecutive sentences on 15 counts are excessive in view of the fact that the essential fraud, although large in scope, was, in the final analysis, one transaction. As noted in our opinion, we are unauthorized to change or reduce the sentences. We do, however, deem the 15 consecutive sentences as to each of the defendants to be unconscionably exces-

sive, as found [illegible] that we consider it necessary to partially remand the case for the purpose of giving the court an opportunity to reconsider the sentences. Neither defendant had any prior convictions and in other respects their records appear to be free of any involvement. The cause, with the exception of the matter remanded, will be retained in this court pending further proceedings.[5]

Both motions for rehearing on liability are denied. The Clerk is directed to recall the mandate pending further proceedings in the trial court.

UNITED STATES of America, Plaintiff-Appellee,

v.

Cassius CARTER, Defendant-Appellant.

No. 72-3732.

United States Court of Appeals, Fifth Circuit.

March 22, 1974.

Defendant was convicted in the United States District Court for the Northern District of Mississippi at Greenville, Orma R. Smith, J., of receiving and concealing two stolen automobiles which had moved in interstate commerce, in violation of the Dyer Act, and he appealed. The Court of Appeals, Goldberg, Circuit Judge, held that exclusion as hearsay of defendant's proposed testimony as to conversation with person from whom he claimed that he obtained one automobile, as bearing on his knowledge that automobile was stolen, was reversible error, and that giving of supplemental instruction on circumstantial evidence which recited illustrations both of which pointed toward the guilt of the accused and which informed jury that it could infer guilt from possession of recently stolen property unless such possession was satisfactorily explained, without repeating that jury should acquit the accused if such possession is consistent with innocence, was likewise reversible error.

Reversed and remanded.

1. Criminal Law ⇐419(2)

In prosecution for receiving and concealing stolen automobiles which had moved in interstate commerce, defendant's proposed testimony about his conversations with person from whom he claimed he obtained one of the stolen vehicles was not properly excludable as hearsay where the same was not offered to establish the truth of what defendant was told by such person, but merely as evidence of what defendant was told, as bearing on his knowledge of whether the automobile was stolen. 18 U.S.C.A. § 2313.

2. Criminal Law ⇐419(2)

Hearsay rule does not apply where extrajudicial declaration is offered without reference to the truth of the matter asserted.

3. Criminal Law ⇐1170(1)

In prosecution for receiving and concealing stolen automobiles which had moved in interstate commerce, error in excluding, as hearsay, defendant's pro-

5 On infrequent occasions there have been decisions which, although affirming convictions, have nevertheless remanded the case to the trial court with directions to reconsider or impose a less severe sentence. *See, for example,* United States v. Wilson, 450 F.2d 405 (5th Cir. 1971) (trial court's failure to sentence under Youth Corrections Act may have been due to inadvertence); Marano v. United States, 374 F.2d 583 (1st Cir. 1967) (district court gave substantial consideration to legally impermissible factors); United States v. West Coast News Co., 357 F.2d 855 (6th Cir. 1966) (sentence of 25 years' imprisonment plus $25,000 fine for violation of federal obscenity statutes); United States v. Wiley, 278 F.2d 500 (7th Cir. 1960) (The record shows that the trial judge imposed a heavier sentence on defendant who stood trial than on the codefendant who pleaded guilty).

A-11

UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
SALT LAKE CITY, UTAH

DATE: April 12, 1974

To: Phillip I. Palmer, Esq., 2130 First National Bank Building, Dallas, Texas 75202
Jimi Mitsunaga, Esq., 731 East South Temple, Salt Lake City, Utah 84102
Robert G. Mahony, Esq. Department of Justice, Criminal Division, Washington, D.C. 20530

Honorable C. Nelson Day, United States Attorney, 200 United States Courthouse, Salt Lake City, Utah 84101

RE: CR 54-71

United States of America
-vs-
Richard MacKay and
Chester Brewer

TAKE NOTICE, that in accordance with Rule 77 (d) of the Federal Rules of Civil Procedure, you are hereby notified that:

MEMORANDUM OPINION RECONSIDERING DEFENDANT'S SENTENCES

was signed by Honorable Willis Ritter on the 12th day of April 19 74; and entered in the docket as of the 12th day of April, 19 74.

VERL C. RITCHIE, Clerk

By: J. Bilanzich
Deputy Clerk

1/74

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Filed in the United States District Court
District of Utah

Date: APR 12 1974

VERL C. RITCHIE
Clerk

UNITED STATES OF AMERICA,	:	
	:	
Plaintiff,	:	
	:	MEMORANDUM OPINION
vs.	:	RECONSIDERING DEFENDANTS'
	:	SENTENCES
RICHARD MACKAY and	:	
CHESTER BREWER,	:	No. CR-54-71
	:	
Defendants.	:	

Defendants Mackay and Brewer were charged in nine counts of a Grand Jury indictment with mail fraud in violation of 18 U. S. C. § 1341, and in six more counts with securities fraud in violation of 15 U.S.C. §78j(b) and 15 U.S.C. § 78ff. The defendants were tried and convicted by a jury on all 15 counts. The trial judge sentenced each of the defendants to one year on each of the 15 counts for a total of 15 years to run consecutively, and fined each of them $27,000. The defendants appealed to the Tenth Circuit Court of Appeals, who in an opinion filed January 2, 1974, affirmed the judgment of conviction and sentence.

Subsequently, on February 4, 1974, the Tenth Circuit partially remanded the case for the purpose of giving the trial court an opportunity to reconsider the sentences. The matter of reconsideration of the sentences was set for hearing before the trial judge on March 7, 1974, and continued to March 8, 1974, at the request of counsel. On March 8th written statements with voluminous attachments were filed by each of the defendants and received by the court in connection with the reconsideration of the sentences. The matter was then taken under advisement by the trial judge.

The trial judge, who heard all the evidence in this case and who sentenced Mackay and Brewer to 15 years' imprisonment, has now read the defendants' written statements and examined the cases cited in Note 1 of the Tenth Circuit's February 4th opinion. In United States v. Wilson, 450 F.2d 405 (4th Cir. 1971) the trial court's failure to sentence under the Federal Youth Corrections Act may have been due to inadvertance. There was, however, no inadvertance here in sentencing Mackay and Brewer. In Marano v. United States, 374 F.2d 583 (1st Cir. 1967), the district court gave substantial consideration to "legally impermissible factors." The trial judge in sentencing Mackay and Brewer, however, did not consider any impermissible factor. In United States v. West Coast News Co., 357 F.2d 855 (6th Cir. 1966), the trial court imposed sentence of 25 years' imprisonment plus a $25,000 fine for violation of federal obscenity statutes. Obviously, there, the punishment did not fit the crime. And in United States v. Wiley, 278 F.2d 500 (4th Cir. 1960), the sentencing judge discriminated against the defendant who stood trial in favor of the defendant who entered a plea of guilty. There was no such discrimination here in the sentencing of Mackay and Brewer.

In the present case the defendants Mackay and Brewer stole an entire insurance company by means of a series of transactions reaching from Salt Lake City, Utah, to Oregon, to Montana, to Texas, to Louisiana, to Pennsylvania and to New York City. The fraud and deceit worked upon people across the country was essential to effectuate their ingenious, complicated scheme. The jury found that the planning and execution

of this scheme required and involved the defendants' intentional, willful and malicious states of mind. The trial court after extensive argument agreed with the jury and denied the defendants' motions for judgment non obstante veredicto, for mistrial, and for submission of Counts 1 through 15 for dismissal of the indictment.

Throughout the trial Mackay and Brewer were represented by counsel of their own choice from the State of Texas. The defendants were given a full opportunity to present their contentions. In the end, however, there was very little indeed that the defendants could say in justification of the crimes of which they were convicted.

The defendant Mackay was a lawyer. Whether he is still a lawyer, the Court is unaware. It is clear from the record that Mackay used his obviously good mind and legal training to devise and execute frauds of colossal proportions.

Contrary to his recent contentions, the defendant Brewer is no uninformed bookkeeper. The record shows his participation in the frauds, falsehoods and deceits. He was in pari delicto and a full partner in carrying out the scheme.

After the long trial of a case fairly presented, the jury found both defendants guilty on each of the 15 separate counts of the indictment.

The writer of this memorandum opinion, who was the sentencing judge, does not impose prison sentences in many cases. His philosophy is that sending a defendant to prison does neither the defendant nor society any good. In many instances, prison affords a full course in advanced criminality. And, on return to life in society, the adjustments after a term in prison are enormously difficult.

Notwithstanding the foregoing, the writer, who sentenced Mackay and Brewer, believes there are certain types of crimes that are particularly dangerous to the citizenry. These crimes are not limited to crimes of violence in which bank robbers or skyjackers go around putting innocent people's lives in danger at the point of a gun. In recent years, and especially in Salt Lake City and the rest of Utah, fraudulent schemes have been worked upon widows, the aged, and others whose life savings, in many cases and in large amounts, have been pilfered by well-dressed, church-going, slick-spoken con men. These con men, with their ingratiating graces, using their social and church connections, pauperize credulous people living out the evenings of their lives solely on their savings. This is what the Mackay and Brewer case is all about, as the record discloses.

The scheme perpetrated by Mackay and Brewer was more subtle, more devious than the garden variety fraud, because Mackay and Brewer were more ingenious and more resourceful. They didn't go around to individual policyholders of the insurance company to steal their money. Instead, Mackay and Brewer stole the entire insurance company, which is a more socially dangerous act than bank robbery or skyjacking.

Recently, Mackay and Brewer have contended in written statements to the trial court that no one has been substantially damaged by the massive fraud which they perpetrated. If this is true, it is only because alert officials conducted a thorough-going investigation of their activities, and the State of Utah with the aid of some excellent lawyers (not in the Utah Attorney General's Office, but employed as Special Assistant Attorneys General) was able with the assistance of the courts to recover

for the policyholders much of what they otherwise would have lost.

Mackay and Brewer's argument that they should be placed on probation or sentenced to shorter terms because no one was substantially damaged by their massive fraud is not unlike a bank robber's contention that he should be acquitted because he dropped the loot inside the bank during his hasty exit. Neither argument reaches the seriousness of the socially dangerous conduct involved in the respective criminal activity.

The judge, who tried the case and sentenced the defendants, respectfully is unable to concur in the Tenth Circuit's February 4th opinion that "We do, however, deem the 15 consecutive sentences as to each of the defendants to be unconscionably excessive, so much so that we consider it necessary to partially remand the case for the purpose of giving the court an opportunity to reconsider the sentences."

In accord with the Tenth Circuit's mandate, the trial court has reconsidered the sentences. In the light of the whole record in this case, the trial court believes that the five years in prison which Mackay and Brewer will serve before being released on parole is little enough. It is unnecessary, of course, to remind the judges of the Court of Appeals who sat on the February 4th panel that under the parole system of the Bureau of Prisons Mackay and Brewer will be paroled normally in one-third of the time sentenced. Perhaps it is necessary to inform the judges of the Court of Appeals that the maximum sentence which could have been imposed on Mackay and Brewer was 57 years' imprisonment and a fine of $69,000. See United States v. Sierra, 452 F.2d 291(10th Cir.1971).

This judge is persuaded that the foregoing is a fair

summarization of the record, including the pre-trial proceedings, the trial, the post-trial motions, the investigative reports of the government agencies, and the reports of the court's own probation officer who prepared the presentence report. I regret, exceedingly, that I do not have the time or resources to document this memorandum opinion by a full and thorough reference to the record.

Dated this 17 day of April, 1974.

BY THE COURT:

Willis Ritter

WILLIS RITTER, Chief Judge

Title 18 USCA

CHAPTER 63. -- MAIL FRAUD

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matters, any matter or thing whatever to be sent or delivered by the Postal Service or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000. or imprisoned not more than five years, or both.

As amended Aug. 12, 1970. Pub.L. 91-375, §6(j) (11), 84 Stat. 778.

Title 18 USCA

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

June 25, 1948, c.645, 62 Stat. 684; Oct. 31, 1951, c.655, §17b, 65 Stat. 717.

Title 15 USCA

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

June 6, 1934, c.404, §10, 48 Stat. 891.

Title 15 USCA

§ 77q. Fraudulent interstate transactions

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly--

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

Title 17 CFR 240.10b-5 (Rule 10b-5)

Rule 10b-5. Employment of Manipulative and Deceptive Devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,

(1) to employ any device, scheme, or artifice to defraud,

(2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

Title 15 USCA

§ 78ff. Penalties

(a) Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

Filed in United States District Court, District of Utah

Time: MAR 8 1974

VERL C. RITCHIE
Clerk

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF UTAH

UNITED STATES OF AMERICA	]	
	]	
vs.	]	NO. Cr 54-71
	]	
RICHARL MACKAY and	]	
CHESTER BREWER	]	

STATEMENT OF CHESTER BREWER IN
CONNECTION WITH IMPOSITION OF SENTENCE

TO THE HONORABLE JUDGE OF THE COURT:

CHESTER BREWER, defendant, requests to Court to consider the imposition of a probationary sentence when the Hearing is held pursuant to the order of the United States Court of Appeals remanding the case for reconsideration of the sentences. He would respectfully show the Court:

I.

That he is fifty-three (53) years of age, married over twenty-six (26) years, with three (3) children whose ages range from nineteen (19) to twenty-four (24) years of age. He has never been involved in criminal activity and has no criminal record other than his conviction in this case. He served with distinction as an officer in the United States Army during World War II, receiving the Purple Heart and six (6) battle stars. He was in combat in North Africa and Europe.

II.

That since he was sentenced on March 30, 1973 and released on bond pending his appeal, he has conducted himself honorably and lawfully, following his profession of mortgage broker and supporting his wife and children to the best of his ability.

III.

That his role in the chain of events described in the indictment was a minor one from which he did not profit. The basic agreements between Kaymac Industries, Inc., Trans-National Service Corporation, Oregon National Life Insurance Company and Dorsey and Company were made in principle before he was employed by Kaymac. His role in carrying out the terms of the contracts made by Richard Mackay and Kaymac Industries, Inc. was a ministerial one rather than that of a principal.

IV.

That the civil litigation relating to these matters in this Court (C. N. Ottosen, Insurance Commissioner, for and on behalf of Federated Security Insurance Company vs. Kaymac Industries, Inc., et al, Civil No. C-407-69, United States District Court for the District of Utah, Central Division) has terminated by settlement and dismissal. The State action "In the Matter of the Rehabilitation of Federated Security Insurance Company", in the District Court of Salt Lake City, State of Utah, Civil No. 189682, has likewise terminated. Copies of pertinent documents relative to those actions are attached for the information of the Court in an Appendix. These show that the rights and interests of the shareholders, policyholders and creditors have been substantially preserved and protected by the Courts and the parties to such settlement agreements.

V.

That he had no knowledge of Securities Exchange Commission Rule 10b-5 (17 CFR 240.10b-5) at the pertinent times covered by the indictment. He was aware generally that the fraud

involving the use of the mails was punishable under federal statutes. While recognizing that he stands convicted, he represents to the Court that he had no intention at any time of defrauding anyone. He did not know that his conduct was contrary to federal law or Rules or Regulations. He sincerely regrets any inconvenience or monetary loss to others to which his actions may have contributed.

VI.

That the period of time from the date of the indictment to the present time, including the trial and subsequent appeal, has been a period of anguish, personal suffering, financial sacrifices and soul searching. He assures the Court that he will, if granted probation, faithfully carry out the terms of such probation.

Respectfully submitted,

CHESTER BREWER

WILLIAM F. BILLINGS
Attorney for Chester Brewer

JOHNSON, GUTHRIE & BILLINGS
1410 Republic National Bank Bldg.
Dallas, Texas 75201
(214) 747-2464

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

UNITED STATES OF AMERICA,	)	File No. C-54-71
Plaintiff,	)	Violations:
v.	)	Sec. 1341, Title 18 U.S.C.
RICHARD MACKAY, and CHESTER BREWER,	)	Sec. 2, Title 18 U.S.C.
Defendants.	)	Sec. 78j(b), Title 15 U.S.C. 17 C.F.R. 240.10b-5
	)	Sec. 78ff, Title 15 U.S.C.
	)	INDICTMENT

The Grand Jury charges:

COUNT I

1. That at all times hereinafter pertinent,

a. Federated Security Insurance Company (hereinafter called "Federated") is a Utah corporation with principal offices and place of business at Salt Lake City, Utah, and is engaged in the life insurance business in Utah and other states. On or about November 6, 1969 Federated was declared insolvent and ordered into rehabilitation by the Third Judicial Court in and for Salt Lake County, State of Utah.

b. Kaymac Industries, Inc. (hereinafter called "Kaymac") is a Texas corporation whose President and Board Chairman Richard L. Mackay owned the majority of its issued and outstanding stock, and operated it as a private holding company for the Mackay family.

c. Trans-National Service Corporation (hereinafter called "Trans-National") is an Oregon corporation and a wholly-owned subsidiary of Oregon National Life Insurance Company.

d. Oregon National Life Insurance Company (hereinafter called "Oregon National") is an Oregon corporation with principal offices and place of business at Portland, Oregon, and is engaged in the life insurance business in Oregon and other states.

e. Transwestern Life Insurance Company (hereinafter called "Transwestern") is a Montana corporation with principal office and place of business at Billings, Montana, and is engaged in the life insurance business in Montana and other states.

f. Dorsey and Company, Inc. (hereinafter called "Dorsey") is a Louisiana corporation with principal offices and place of business at New Orleans, Louisiana, and is a registered broker-dealer in securities.

g. United Housing Corporation (hereinafter called "United Housing") is a New York corporation with offices in the states of New York and Maryland, and is engaged in the real estate

business offering real estate for sale representing either the buyer or the seller and also arranges for mortgages for financing.

h. Peoples Bond and Mortgage Company (hereinafter called "Peoples") is a Pennsylvania corporation with offices and place of business at Philadelphia, Pennsylvania, and is in engaged in the mortgage banking business.

i. Richard L. Mackay (hereinafter called "Mackay") is an Attorney and the President, Chairman of the Board and owner of the majority of the issued and outstanding stock of Kaymac.

j. Chester L. Brewer (hereinafter called "Brewer") is a banker and financial consultant engaged in the mortgage business. He is a vice-president for finance of Kaymac.

2. From on or about April 25, 1969, and continuing to on or about October 31, 1969, RICHARD L. MACKAY and CHESTER L. BREWER, the defendants herein, unlawfully, wilfully and knowingly devised and intended to devise a scheme and artifice to defraud policyholders, claimants, creditors and public minority stockholders of Federated, and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises would be and were false and fraudulent when made, which scheme and artifice to defraud is set forth more fully below:

3. It was a part of said scheme and artifice to defraud that the defendants, having organized and elected themselves directors and controlling officers of Kaymac, which had neither assets nor business of any substance, would and did employ Kaymac to obtain and did obtain control of the business and affairs of Federated and of its cash and securities, including stock, bonds, notes and mortgages, constituting nearly the entire financial

reserves of the company, and would and did cause said securities of Federated to be sold, and would and did appropriate and divert the proceeds of the sale of said securities, together with the cash in the company, to their own use and benefit for the implementation of their fraudulent scheme, all to the loss and deprivation of the policyholders, claimants, creditors and public minority stockholders of Federated, who were dependent upon these assets of the company to insure payment of claims and assure the continued financial solvency of the company.

4. It was a further part of said scheme and artifice to defraud that the defendants, operating through Kaymac, which corporation the defendants controlled, would and did purchase from Trans-National, approximately 93% of the issued and outstanding stock of Federated, amounting to approximately 519,440 shares and constituting the controlling stock of the company, for a purchase price of approximately $3,000,000.

5. It was a further part of said scheme and artifice to defraud that the defendants, operating through Kaymac and using the assets of Federated, would and did purchase from Trans-National, approximately 19.5% of the issued and outstanding stock of Transwestern, amounting to approximately 429,069 shares, for a purchase price of approximately $790,000.

6. It was a further part of said scheme and artifice to defraud that the defendants, operating through Mackay Industries, Inc. (thereafter name changed to Kaymac Industries, Inc. and hereinafter called "Kaymac") a Texas corporation, with principal offices at Dallas, Texas, would and did purchase from National American Life Insurance Company (hereinafter called "National American") a Louisiana corporation, with principal offices at Baton Rouge, Louisiana, approximately 66.5% of the issued and outstanding stock of Transwestern, amounting to approximately

1,465,012 shares and constituting the controlling stock of the company, for a purchase price of approximately $2,250,000.

7. It was further part of said scheme and artice to defraud that the defendants would arrange to borrow and did borrow from Dorsey the sum of $3,000,000 upon the representation that the funds obtained would be utilized to purchase approximately 93% of the issued and outstanding stock of Federated.

8. It was a further part of said scheme and artifice to defraud that the defendants, in order to induce Dorsey to make the said $3,000,000 loan, would and did cause to be assigned and conveyed to Dorsey approximately $4,535,000 of securities, constituting nearly the entire financial reserves of Federated, with instructions to Dorsey to sell said securities, and from the proceeds of such sale to repay its $3,000,000 loan to Kaymac, as well as finders' and brokers' fees in connection therewith to Robert H. Martin and Robert J. Bateman, and to pay the sum of $1,000,000, as partial payment for defendants' purchase of 1,465,012 shares, constituting the controlling stock of Transwestern, from National American.

9. It was a further part of said scheme and artifice to defraud that the defendants would and did make the following false and fraudulent representations to Dorsey in connection with the sale of Federated's securities through Dorsey and in order to induce Dorsey to enter into such arrangement:

(a) that defendants had authority from Federated to make such arrangements with Dorsey;

(b) that defendants had arranged for and would convey to Federated sufficient free, clear, and unencumbered government insured mortgages to replace the stocks and bonds of Federated which Dorsey would sell; and

(c) that the sale of Federated's securities would in no way diminish its assets or incur the disapproval of the Utah Insurance Commissioner.

In truth and in fact, as defendants well knew and concealed from Dorsey;

(d) that defendants had no such free, clear, and unencumbered mortgages to convey to Federated but had only an arrangement, fraudulently induced and impossible to execute, whereby United Housing would conditionally convey bulk mortgages to Federated with an immediate conveyance back to United or its assignees;

(e) that said bulk mortgages from United Housing would not be free and clear, but would remain in the possession of United Housing or its assignees until certain promissory notes issued to United Housing by Kaymac were paid in full;

(f) that defendants had neither the means nor intention of paying said promissory notes; and

(g) that the entire arrangement was intended to and would result in the almost complete disposition of the assets of Federated, and had been concealed from and would be necessarily disapproved by the Utah Insurance Commissioner.

10. It was a further part of said scheme and artifice to defraud that the defendants, coincident with the arrangements with Dorsey, arranged with said United Housing to assign to Federated a block of government insured mortgages having a face value of approximately $4,500,000, to be paid for by promissory notes of Kaymac payable in 90 and 120 days, said mortgages thereupon

to be immediately assigned back to United Housing, effective until the Kaymac notes were paid in full. In order to induce such agreement with United Housing, defendants falsely and fraudulently represented: To whom

(a) that Kaymac was able to and would make payment when due of its promissory notes given for said mortgages;

(b) that defendants were in control of Federated;

(c) that Federated would guarantee the notes of Kaymac given in payment for said mortgages; and

(d) that duly elected officers of Federated had authorized the reconveyance of said mortgages to United Housing or its assignee as security for payment of the Kaymac notes.

In truth and in fact, as defendants well knew and concealed from United Housing:

(e) that defendants did not have control of Federated;

(f) that defendants had no authority to commit Federated to guarantee the notes of Kaymac to United Housing; and

(g) that provisions for reconveyance of the mortgages to the United Housing or its assignees as security for the Kaymac notes were contrary to the express direction of the then officers of Federated against any diminution of the assets of Federated.

11. It was a further part of said scheme and artifice to defraud that the defendants after having fraudulently induced the aforesaid arrangements with Dorsey and United Housing and concealed the true nature of said arrangements from the then officers and directors of Federated and of Trans-National, from whom they were

negotiating to purchase the 519,440 shares of Federated and the 429,069 shares of Transwestern, the defendants would and did consummate the purchase by Kaymac from Trans-National of said 519,440 shares, constituting the controlling stock of Federated, paying purchase price with the $3,000,000 borrowed from Dorsey, and immediately thereafter defendants would and did cause the then officers and directors of Federated to resign and would and did cause the election of defendants' nominees as directors, and the election of defendants Mackay and Brewer as officers in complete control of the affairs of Federated. In order to induce the officers and directors of Federated and Trans-National to sell said shares of Federated and to resign and permit the election of defendants Mackay and Brewer as controlling officers of Federated, and to effect the purchase of the Transwestern stock by Kaymac, defendants would and did falsely and fraudulently represent:

(a) that $3,000,000 to purchase the 519,400 shares of Federated from Trans-National was being provided to Kaymac by a loan from Dorsey, secured by the Federated stock being purchased by Kaymac and by a block of mortgages owned by Mackay and Kaymac;

(b) that Government guaranteed mortgages in the amount of $1,250,000 had been assigned by Kaymac to Federated to replace the mortgages and cash being assigned from Federated to Kaymac in connection with the purchase of the 429,069 shares of Transwestern; and

(c) that defendants would not by their action in any way diminish the assets of Federated or incur the disapproval of the Utah Insurance Commission.

In truth and in fact, as defendants well knew and concealed from said officers and directors of Federated and Trans-National:

(d) that $3,000,000 used to purchase the 519,440 shares of Federated for Kaymac from Trans-National was being provided under an arrangement whereby most of the securities owned by Federated were being sold by Dorsey to repay a $3,000,000 loan by Dorsey and to pay finders' fees in connection with said arrangement, and to make payment on a contract for the purchase by Kaymac of the controlling stock of Transwestern from National American;

(e) that defendants owned no mortgages to convey to Federated and the only mortgages available to defendants to convey to Federated would be and were encumbered and reassigned to United Housing or its assignees to secure promissory notes of Kaymac, which defendants had neither the intention nor means to pay;

(f) that the loan by Dorsey was obtained by false representations and concealment of material facts from Dorsey as described in paragraph 9 above;

(g) that Government insured mortgages which defendants represented had been assigned by Kaymac to Federated to replace the mortgages and cash of Federated used to purchase the Transwestern stock from Trans-National had not been assigned to Federated by Kaymac; and

(h) that the arrangements for the purchase of the stock of Federated and Transwestern from Trans-National would result in the disposition and dissipation of most of the assets of Federated.

12. It was also a further part of said scheme and artifice to defraud that the defendants would and did cause assets of Federated valued in excess of $700,000 to be used to pay for the stock of Transwestern, acquired by Kaymac from Trans-National, without replacement of said assets or offsetting remuneration or benefit to Federated.

13. It was also a further part of said scheme and artifice to defraud that the defendants would and did falsely represent to the Utah Insurance Department, in connection with the sale of Federated's assets, that they would be replaced with approved mortgages which would bear interest at not less than 7 1/2% per annum, thus improving the financial condition of Federated; whereas, in truth and in fact, as the defendants well knew and concealed, the mortgages and bonds removed from the assets of Federated and used for the purposes stated were not replaced with other assets of equal value or with any other assets.

14. It was also a further part of said scheme and artifice to defraud that the defendants, while in control of the affairs of Federated, would and did use such control in securing purported free, clear and unencumbered Assignments of Mortgages, duly recorded as assets on the books and records of Federated, from People's, the assignee of United Housing, totalling $6,036,727.92, when in truth and in fact, as the defendants well knew and concealed, the purported Assignments of Mortgages were encumbered as follows:

(a) the defendants, to secure the purported Assignments of Mortgages, issued and caused to be issued promissory notes from Kaymac to United Housing in the approximate amount of $5,900,000.00, subsequently assigned to Peoples,

(b) the defendants issued and caused to be issued written agreements whereby Federated agreed to pay said promissory notes in the event of default by Kaymac, and

(c) the defendants issued and caused to be issued an immediate reassignment of the purported Assignments of Mortgages back to Peoples, none of which was duly recorded upon the books and records of Federated.

15. It was also a further part of said scheme and artifice to defraud that after the defendants had acquired 93% of the issued and outstanding stock of Federated, they knowingly caused a letter to be sent to stockholders of Federated dated August 11, 1969, advising that the acquisition of the stock of Federated by Kaymac would improve the financial position and condition of Federated and increase the value of its stock, for the purpose of lulling the stockholders into a false sense of security and delaying complaints.

16. It was a further part of said scheme, and artifice to defraud that the defendants while in control of the affairs of Federated, would and did use such control in attempting to make acquisitions of other insurance companies, and would and did dispose of and dissipate assets of Federated, all for the benefit of said defendants, and to the loss and deprivation of the public minority stockholders, policyholders, claimants, and creditors of Federated, by numerous acts, including but not limited to the following:

(a) on or about July 30, 1969 defendants authorized the payment by Dorsey & Co., from the proceeds of the sale of securities of Federated, of the sum of $1,000,000 to National American as partial payment for the purchase for defendants of the controlling stock

of Transwestern, and pursuant to said instructions on August 25, 1969 Dorsey & Co. issued a check numbered 26310 for $500,000 to the order of Federated which defendants caused to be endorsed and paid over to National American as partial payment for the purchase for defendants of the controlling stock of Transwestern;

(b) that on or about August 29, 1969, defendants Mackay and Brewer caused the issuance of a check numbered 79295 on the account of Federated for $250,000 payable to National American Life Insurance Company as partial payment for the purchase for defendants of the controlling stock of Transwestern;

(c) that on or about September 18, 1969, defendants Mackay and Brewer executed four checks numbered 79466, 79467, 79468 and 79469, in the amount of $5,000 each payable to Professional Insurers, Tulsa, Oklahoma, in partial payment of an agreed fee of $97,500 in connection with arrangements for defendant Kaymac to purchase the controlling stock of Transwestern from National American; and

(d) that on or about September 20, 1969, defendants Mackay and Brewer caused the issuance of a check numbered 79471 by Federated in the amount of $25,000, as partial payment by Kaymac on the purchase price of the controlling stock of Organized Security Life Insurance Co. from Dr. Jim G. Duckett; and on said date caused the issuance of two irrevocable and unconditional agreements by Federated to purchase two notes issued by Dr. Duckett to United Founders

Life Insurance Co. in the amounts of $625,000 and $125,000, respectively, said agreements being effective upon the default of said Kaymac under its contract to purchase said Organized Security Life Insurance Co. from Dr. Duckett.

17. It was also a further part of said scheme and artifice to defraud that the defendants, while in control of the affairs of Federated, would and did dispose of and dissipate assets of Federated, all for the benefit of said defendants and to the loss and deprivation of the minority public stockholders, policyholders, claimants, and creditors of Federated by numerous acts, including but not limited to the following:

(a) that on or about July 30, 1969, defendants authorized the sale by Dorsey & Co. of nearly the entire portfolio of bonds and preferred stock of Federated and the payment from the proceeds thereof of $3,000,000 to Dorsey & Co. for funds loaned to defendants to effectuate the purchase of the stock of Federated from Trans-National and of $365,000 in fees and charges by Dorsey and others participating in the arrangement for said loan;

(b) that on or about July 30, 1969, defendants caused the issuance of a check numbered 78674 by Federated for $90,000 to the order of First Security Bank of Utah with instructions to said bank to transfer $90,000 to the Madison National Bank, Washington, D.C. for the credit of United Housing in connection with defendants' arrangements for a bulk assignment of Government guaranteed mortgages to Federated;

(c) that on or about August 6, 1969, defendants Mackay and Brewer caused the issuance of two checks numbered

78795 and 78796 on the account of Federated in the amount of $12,500 each, payable to United Housing, and on August 12, 1969 a check numbered 78792 for $3,000 payable to United Housing, said checks being in connection with defendants' arrangement to obtain an assignment of Government guaranteed mortgages to Federated;

(d) that on or about August 6, 1969, defendants Mackay and Brewer caused the issuance of a check numbered 78797 on the account of Federated for $4,400 payable to Texas Western Financial Corporation, Dallas, Texas, to pay delinquent accounts of Porcelian Building, Inc. (Porcelain), a company owned by Kaymac;

(e) that on or about August 6, 1969, defendants Mackay and Brewer caused the issuance of a check numbered 78799 on the account of Federated for $12,024 payable to Mercantile National Bank, Dallas, Texas to pay delinquent accounts of Porcelain;

(f) on or about August 6, 1969 defendants Mackay and Brewer caused the issuance of a check numbered 78798 on the account of Federated for $16,362 payable to Mercantile National Bank, Dallas, Texas to pay delinquent accounts of Porcelain;

(g) that on or about September 12, 1969, defendants Mackay and Brewer caused the issuance of a check numbered 78794 on the account of Federated for $7,500 payable to Palmer, Palmer & Burke, Attorneys, Dallas, Texas in payment of a personal judgment against defendant Mackay;

(h) that on or about September 22, 1969, defendants Mackay and Brewer caused the issuance of a check numbered 79472 on the account of Federated for $2,500 payable to Peat, Marwick and Mitchell, Dallas, Texas as an advance payment for an audit of the books of Porcelain.

(i) that on or about September 29, 1969, defendants Mackay and Brewer executed a check numbered 79477 on the account of Federated for $15,000 payable to Peninsula Electronics Corporation of Orlando, Florida, a company in which defendant Mackay's brother, Roger Mackay, held stock ownership, as a loan to finance the manufacture of a burglar alarm system;

(j) that on or about September 30, 1969, defendants Mackay and Brewer caused to be issued a check numbered 79474 on the account of Federated in the amount of $2,695.00 payable to Exchange Bank and Trust Co., said funds to be used for the purchase of shares of Transwestern and New American Life Insurance Company for the personal benefit of defendants;

(k) that on or about October 8, 1969, defendants Mackay and Brewer caused the issuance of a check numbered 79298 on the account of Federated in the amount of $5,159.78 payable to the Exchange Bank and Trust Co., said funds to be used for the purchase of shares of Federated for the personal benefit of defendants;

(l) that on or about October 13, 1969, defendants Mackay and Brewer caused the issuance of two checks

on Federated's account, each in the amount of $5,000, to Claire Gillen Co. to apply on the purchase price of a $140,000 home for defendant Mackay;

18. It was a further part of said scheme and artifice to defraud that the defendants would and did falsely represent to the Third Judical Court in and for Salt Lake County, State of Utah, on or about October 17, 1969, in sworn testimony, that the purported Assignments of Mortgages from Peoples were free, clear, and unencumbered, and that Peoples would affirm the sworn testimony; whereas, in truth and in fact, as the defendants well knew and concealed, Peoples would and did refuse to affirm that the purported Assignments of Mortgages were free, clear, and unencumbered.

19. On or about July 30, 1969, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, the defendants Richard Mackay and Chester Brewer caused to be placed in an authorized depository for mail at Salt Lake City, within the State and District of Utah, a letter, being Registered Article No. 94789, sent by ZIONS FIRST NATIONAL BANK, adressed to DORSEY & CO., INC., Suite 1012 Hibernia Building, New Orleans, Louisiana, containing, among other things, three stock certificates totalling 519,434 shares of stock of Federated Security Insurance Company, to be sent and delivered by the Post Office Department according to the direction thereon, in violation of 18 U.S.C. 1341, and 2.

COUNT II

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations contained in Count I except the last paragraph thereof.

2. On or about July 31, 1969, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, the defendants Richard Mackay and Chester Brewer caused to be placed in an authorized depository for mail matter at Salt Lake City, within the State and District of Utah, a package being Registered Article No. 114647, sent by RICHARD L. MACKAY, FEDERATED SECURITY INSURANCE COMPANY, addressed to IRVING TRUST COMPANY, One Wall Street, New York, New York, containing securities representing a portion of the assets of Federated Security Insurance Company, to be sent and delivered by the Post Office Department according to the direction thereon, in violation of 18 U.S.C. 1341 and 2.

COUNT III

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations contained in Count I except the last paragraph thereof.

2. On or about August 4, 1969, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, the defendants Richard Mackay and Chester Brewer caused to be placed in an authorized depository for mail matter at Salt Lake City, within the State and District of Utah, a package, being Registered Article No. 114673, sent by FEDERATED SECURITY INSURANCE COMPANY, addressed to HIBERNIA NATIONAL BANK, New Orleans, Louisiana 70112, containing securities representing a portion of the assets of Federated Security Insurance Company, to be sent and delivered by the Post Office Department according to the direction thereon, in violation of 18 U.S.C. 1341, and 2.

COUNT IV

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations contained in Count I except the last paragraph thereof.

2. On or about August 4, 1969, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, the defendants Richard Mackay and Chester Brewer caused to be placed in an authorized depository for mail matter at Salt Lake City, within the State and District of Utah, a package, being Registered Article No. 114674, sent by FEDERATED SECURITY INSURANCE COMPANY, addressed to HIBERNIA NATIONAL BANK, New Orleans, Louisiana 70112, containing securities representing a portion of the assets of Federated Security Insurance Company, to be sent and delivered by the Post Office Department according to the direction thereon, in violation of 18 U.S.C. 1341, and 2.

COUNT V

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations contained in Count I except the last paragraph thereof.

2. On or about August 13, 1969, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, the defendants Richard Mackay and Chester Brewer caused to be delivered by mail at Salt Lake City, within the State and District of Utah, according to the direction thereon, a letter mailed by FEDERATED SECURITY INSURANCE COMPANY, addressed to MR. JOHN GRIEDER, 1060 Lincoln Street, Salt Lake City, Utah 84105, in violation of 18 U.S.C. 1341, and 2.

COUNT VI

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations contained in Count I except the last paragraph thereof.

2. On or about August 13, 1969, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, the defendants/caused Richard Mackay and Chester Brewer to be delivered by mail at Salt Lake City, within the State and District of Utah, according to the direction there on, a letter mailed by FEDERATED SECURITY INSURANCE COMPANY, addressed to MR. PAUL COTRO-MANES, 4318 Shirley Lane, Salt Lake City, Utah 84117, in violation of 18 U.S.C. 1341, and 2.

COUNT VII

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations contained in Count I except the last paragraph thereof.

2. On or about September 5, 1969, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, the defendants/caused Richard Mackay and Chester Brewer to be placed in an authorized depository for mail matter at Salt Lake City, within the State and District of Utah, an inter-office memorandum from BREEPERD LARGE, FEDERATED SECURITY INSURANCE COMPANY, addressed to CHESTER BREWER, 3883 Turtle Creek Boulevard, Dallas, Texas 75219, to be sent and delivered by the Post Office Department according to the directions thereon, in violation of 18 U.S.C. 1341, and 2.

COUNT VIII

This Grand Jury further charges:

1. The Grand Jury realleges all of the allegations contained in Count I except the last paragraph thereof.

2. On or about October 18, 1969, for the purpose of executing the aforesaid schere and artifice to defraud, and attempting to do so, the defendants caused to be delivered by mail at Salt Lake City, within the State and District of Utah, according to the direction thereon, a letter mailed by KAYMAC INDUSTRIES, INC., Dallas Texas, addressed to MR. NORMAN B. SMITH, FEDERATED SECURITY INSURANCE COMPANY, enclosing stock certificates for transfer and issue of new certificates in the name of Richard L. Mackay, in violation of 18 U.S.C. 1341, and 2.

COUNT IX

The Grand Jury further charges:

1. The Grand Jury realleges all of the allegations contained in Count I except the last paragraph thereof.

2. On or about October 20, 1969, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so, the defendants caused to be delivered by mail at Salt Lake City, within the State and District of Utah, according to the direction thereon, a letter mailed by KAYMAC INDUSTRIES, INC., Dallas, Texas addressed to MR. NORMAN B. SMITH, FEDERATED SECURITY INSURANCE COMPANY, enclosing stock certificates for transfer and issue of new certificates in the name of Richard L. Mackay, in violation of 18 U.S.C. 1341, and 2.

COUNT X

The Grand Jury further charges:

1. The Grand Jury repeats and realleges the allegations contained in paragraph (1) one of Count I of this indictment.

2. On or about July 28, 1969 the defendants RICHARD MACKAY AND CHESTER BREWER, unlawfully, wilfully, and knowingly, directly and indirectly, by the use of and by causing the use of a means and instrumentality of interstate commerce, to-wit: a commercial aircraft flight on a common carrier, between Portland, Oregon and Salt Lake City, Utah, by certain officials of Federated, Oregon National, and Trans-National, used and employed, in connection with the purchase of certain securities, to-wit: (a) Issued and outstanding stock of Federated, (b) Issued and outstanding stock of Transwestern; and in connection with the sale of certain securities, to-wit: preferred stock, bonds, notes and mortgages of Federated, a manipulative and deceptive device and contrivance in violation of Section 10(b) of the Securities Exchange Act of 1934 (Sec. 78j(b) of Title 15 U.S.C.) and of Rule 10b-5 thereunder (17 C.F.R. 240.10b-5) duly prescribed by the Securities and Exchange Commission, in that the defendants in the manner and means set forth in paragraphs two (2) through (18) eighteen of Count I of this indictment, which are incorporated by reference and realleged as though fully set forth herein, and in connection with the purchase and sale of certain securities described above, did employ a device, scheme and artifice to defraud, made untrue statements of material facts and omitted to state material facts necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, and engaged in transactions, practices and a course of business which

would and did operate as a fraud and deceit upon certain persons, including Federated and its policyholders, public minority stockholders, claimants and creditors, in violation of Title 15 U.S.C. Sections 78j(b), and 78ff, Title 17 C.F.R. Section 240.10b-5, and Title 18 U.S.C. Section 2.

COUNT XI

The Grand Jury further charges:

1. The Grand Jury repeats and realleges the allegations contained in paragraph (1) one of Count I of this indictment.

2. On or about July 27, 1969 the defendants RICHARD MACKAY AND CHESTER BREWER, unlawfully, wilfully, and knowingly, directly and indirectly, by the use of and by causing the use of a means and instrumentality of interstate commerce, to-wit: a commercial aircraft flight on a common carrier, between New Orleans, Louisiana and Salt Lake City, Utah, by George Dorsey, President of George Dorsey and Co., Inc., used and employed in connection with the purchase of certain securities, to-wit: (a) Issued and outstanding stock of Federated, (b) Issued and outstanding stock of Transwestern; and in connection with the sale of certain securities, to-wit: preferred stock, bonds, notes and mortgages of Federated, a manipulative and deceptive device and contrivance in violation of Section 10(b) of the Securities Exchange Act of 1934 (Sec. 78j(b) of Title 15 U.S.C.) and of Rule 10b-5 thereunder (17 C.F.R. 240.10b-5) duly prescribed by the Securities and Exchange Commission, in that the defendants in the manner and means set forth in paragraphs two (2) through (18) eighteen of Count I of this indictment, which are incorporated by reference and realleged as though fully set forth herein, and in connection with the purchase and sale of certain securities described above,

did employ a device, scheme and artifice to defraud, made untrue statements of material facts and omitted to state material facts necessary to make the statements made, in the light of the circumstances under which they were made, not misleading and engaged in transactions, practices and a course of business which would and did operate as a fraud and deceit upon certain persons, including Federated and its policyholders, public minority stockholders, claimants and creditors in violation of Title 15 U.S.C. Sections 78j(b) and 78ff, Title 17 C.F.R. Section 240.10b-5, and Title 18 U.S.C. Section 2.

COUNT XII

The Grand Jury further charges:

1. The Grand Jury repeats and realleges the allegations contained in paragraph (1) one of Count I of this indictment.

2. On or about July 31, 1969 the defendants RICHARD MACKAY AND CHESTER BREWER, unlawfully, wilfully and knowingly, directly and indirectly, by the use of and by causing the use of the mails, used and employed in connection with the purchase of certain securities, to-wit: (a) Issued and outstanding stock of Federated, (b) Issued and outstanding stock of Transwestern; and in connection with the sale of certain securities, to-wit: preferred stock, bonds, notes and mortgages of Federated, a manipulative and deceptive device and contrivance in violation of Section 10(b) of the Securities Exchange Act of 1934 (Sec. 78j(b) of Title 15 U.S.C.) and of Rule 10b-5 thereunder (17 C.F.R. 240.10b-5) duly prescribed by the Securities and Exchange Commission, in that the defendants in the manner and means set forth in paragraphs (2) two through (18) eighteen of Count I of this indictment, which are incorporated by reference and realleged as though

fully set forth herein, and in connection with the purchase and sale of certain securities described above, did employ a device, scheme, and artifice to defraud, made untrue statements of material facts and omitted to state material facts necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, and engaged in transactions, practices, and a course of business which would and did operate as a fraud and deceit upon certain persons, including Federated and its policyholders, public minority stockholders, claimants and creditors.

3. In the employment of the aforesaid fraudulent scheme and course of business in connection with the purchase and sale of securities, the defendants on or about July 31, 1969, caused to be sent by registered mail (Register Number 114648), according to the directions thereon, from Salt Lake City, within the State and District of Utah, a package containing bonds and preferred stock of Federated addressed from Richard L. Mackay, Federated Security Insurance Company, 72 East 4th Street, Salt Lake City, Utah 84111 to Irving Trust Co., One Wall Street, New York, New York; in violation of Title 15 U.S.C. Sections 78j(b) and 78ff, Title 17 C.F.R. Section 240.10b-5, and Title 18 U.S.C. Section 2.

COUNT XIII

The Grand Jury further charges:

1. The Grand Jury repeats and realleges the allegations contained in paragraph (1) one of Count I of this indictment.

2. On or about August 4, 1969 the defendants RICHARD MACKAY AND CHESTER BREWER, unlawfully, wilfully and knowingly, directly and indirectly, by the use of and by causing the use of the mails, used and employed in connection with the purchase of certain securities, to-wit: (a) Issued and outstanding stock of Federated,

(b) Issued and outstanding stock of Transwestern; and in connection with the sale of certain securities, to-wit: preferred stock, bonds, notes and mortgages of Federated, a manipulative and deceptive device and contrivance in violation of Section 10(b) of the Securities Exchange Act of 1934 (Sec. 78j(b) of Title 15 U.S.C.) and of Rule 10b-5 thereunder (17 C.F.R. 240.10b-5) duly prescribed by the Securities and Exchange Commission, in that the defendants in the manner and means set forth in paragraphs (2) two through (18) eighteen of Count I of this indictment, which are incorporated by reference and realleged as though fully set forth herein, and in connection with the purchase and sale of certain securities described above, did employ a device, scheme, and artifice to defraud, made untrue statements of material facts and omitted to state material facts necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, and engaged in transactions, practices, and a course of business which would and did operate as a fraud and deceit upon certain persons, including Federated and its policyholders, public minority stockholders, claimants and creditors.

3. In the employment of the aforesaid fraudulent scheme and course of business in connection with the purchase and sale of securities, the defendants on or about August 4, 1969, caused to be sent by registered mail (Register Number 114672), according to the directions thereon, from Salt Lake City, within the State and District of Utah, a package containing bonds and preferred stock of Federated addressed from Federated Security Insurance Company, 72 East 4th Street, Salt Lake City, Utah 84111 to Hibernia National Bank, Attention John Hunn, Vice-President, New Orleans, Louisiana 70112; in violation of Title 15 U.S.C. Sections 78j(b)

and 78ff, Title 17 C.F.R. Section 240.10b-5 and Title 18 U.S.C. Section 2.

COUNT XIV

The Grand Jury further charges:

1. The Grand Jury repeats and realleges the allegations contained in paragraph (1) one of Count I of this indictment.

2. On or about July 31, 1969 the defendants RICHARD MACKAY AND CHESTER BREWER, unlawfully, wilfully and knowingly, directly and indirectly, by the use of and by causing the use of a means and instrumentality of interstate commerce, to-wit, the telegraphic transfer, according to the directions thereon, of Federated funds in the amount of $90,000 through the facilities of the Federal Reserve Bank of San Francisco, Salt Lake City Branch, to the Madison National Bank, Washington, D.C. for the credit of United Housing Corporation, 370 Lexington, New York, New York, used and employed in connection with the purchase of certain securities, to-wit: (a) Issued and outstanding stock of Federated, (b) Issued and outstanding stock of Transwestern; and in connection with the sale of certain securities, to-wit: preferred stock, bonds, notes and mortgages of Federated, a manipulative and deceptive device and contrivance in violation of Section 10(b) of the Securities Exchange Act of 1934 (Sec. 78j(b) of Title 15 U.S.C.) and of Rule 10b-5 thereunder (17 C.F.R. 240.10b-5) duly prescribed by the Securities and Exchange Commission, in that the defendants in the manner and means set forth in paragraphs (2) two through (18) eighteen of Count I of this indictment, which are incorporated by reference and realleged as though fully set forth herein, and in connection with the purchase and sale of certain securities described above, did

employ a device, scheme, and artifice to defraud, made untrue statements of material facts and omitted to state material facts necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, and engaged in transactions, practices, and a course of business which would and did operate as a fraud and deceit upon certain persons, including Federated and its policyholders, public minority stockholders, claimants and creditors, in violation of Title 15 U.S.C. Sections 78l(b) and 78ff, Title 17 C.F.R. Section 240.10b-5, and Title 18 U.S.C. Section 2.

COUNT XV

The Grand Jury further charges:

1. The Grand Jury repeats and realleges the allegations contained in paragraph (1) one of Count I of this indictment.

2. On or about August 20, 1969 the defendants RICHARD MACKAY AND CHESTER BREWER, unlawfully, wilfully and knowingly, directly and indirectly, by the use of and by causing the use of a means and instrumentality of interstate commerce, to-wit: a commercial aircraft flight on a common carrier, delivered documents, from Kaymac Industries, Inc., 3883 Turtle Creek Boulevard, Dallas, Texas to Federated Security Insurance Company, 71 East 4th South, Salt Lake City, Utah, which purported to be copies of Assignments of Mortgages from Peoples Bond and Mortgage Company to Federated Security Insurance Company, granting, selling, assigning and transferring to Federated, mortgages of a total value of $6,036,727.92, as per schedules attached thereto, used and employed in connection with the purchase of certain securities, to-wit: (a) Issued and outstanding stock of Federated, (b) Issued and outstanding stock of Transwestern; and in connection with

the sale of certain securities, to-wit: preferred stock, bonds, notes and mortgages of Federated, a manipulative and deceptive device and contrivance in violation of Section 10(b) of the Securities Exchange Act of 1934 (Sec. 78j(b) of Title 15 U.S.C.) and of Rule 10b-5 thereunder (17 C.F.R. 240.10b-5) duly prescribed by the Securities and Exchange Commission, in that the defendants in the manner and means set forth in paragraphs (2) two through (18) eighteen of Count I of this indictment, which are incorporated by reference and realleged as though fully set forth herein, and in connection with the purchase and sale of certain securities described above, did employ a device, scheme, and artifice to defraud, made untrue statements of material facts and omitted to state material facts necessary to make the statements made, in the light of the circumstances under which they were made, not misleading, and engaged in transactions, practices, and a course of business which would and did operate as a fraud and deceit upon certain persons, including Federated and its policyholders, public minority stockholders, claimants and creditors, in violation of Title 15 U.S.C. Sections 78j(b) and 78ff, Title 17 C.F.R. Section 240.10b-5, and Title 18 U.S.C. Section 2.

A TRUE BILL

FOREMAN

UNITED STATES ATTORNEY

THIS IS AN AGREEMENT between TRANS-NATIONAL SERVICE CORPORATION, an Oregon corporation ("Trans-National") and KAYMAC INDUSTRIES, INC., a Texas corporation ("Kaymac").

RECITALS:

Trans-National desires to sell to Kaymac and Kaymac desires to purchase from Trans-National, on the terms and conditions set forth herein, all corporate stock now held by Trans-National in Federated Security Insurance Company, a Utah insurance corporation ("Federated"), and in Transwestern Life Insurance Company, a Montana insurance corporation ("Transwestern").

NOW, THEREFORE, IT IS AGREED:

1. Trans-National agrees to sell and hereby sells, transfers and assigns to Kaymac and Kaymac agrees to purchase and hereby purchases and acquires from Trans-National, 519,440 shares of the common stock of Federated, being approximately 93% of the 556,430 authorized, issued and outstanding shares of Federated stock.

2. In consideration of Trans-National's sale to it of the above-mentioned Federated stock, Kaymac shall pay to Trans-National at "Federated Closing," as hereinafter defined, cash in the amount of $3,000,000, payable in a form and manner satisfactory to Trans-National.

3. Trans-National agrees to sell and hereby sells, transfers and assigns to Kaymac and Kaymac agrees to purchase and hereby purchases and acquires from Trans-National, 429,069 shares of the issued and outstanding common stock of Transwestern.

4. In consideration of Trans-National's sale to it of the above-mentioned Transwestern stock, Kaymac shall pay to Trans-National at "Transwestern Closing," as hereinafter defined, a consideration of $799,000, payable by:

A. Assignment (satisfactory in content and form to Trans-National) and delivery to Trans-National of first lien real property mortgages and the promissory notes underlying them which are admissible as assets under the insurance laws of the State of Oregon and which had an aggregate of principal balances as of March 31, 1969 of $796,929.82; and

B. Cash in an amount equal to the aggregate of payments in reduction or payment of principal of the abovementioned mortgages made since March 31, 1969, provided, however, that the cash to be paid under this Subparagraph 4(B) shall not exceed that amount which, when added to the principal balances of the abovementioned mortgages as of "Transwestern Closing," equals $790,000.

5. The following provisions shall govern the mortgages referred to in Paragraph 4(A) hereof:

A. Upon delivery of each mortgage assignment to Trans-National, Kaymac shall be deemed to warrant and represent that it has good and sufficient title to all such mortgages, free and clear of any claims, assignments or interests of any other person or entity; that it lawfully may transfer and deliver said mortgages to Trans-National; and that the mortgages, notes and accompanying documents or instruments are true, complete and what they purport to be.

B. In the event Trans-National determines within thirty (30) days following Transwestern closing that any such mortgage is unacceptable to it, or in the event that, as a result of examination of Oregon National Life Insurance Co. ("Oregon National") next occurring, it is determined that all or any portion of any such mortgage cannot be treated as an admitted asset for Oregon National, then, within ten (10) business days following written demand, Kaymac shall substitute and deliver one or more mortgages which shall have an average net return of approximately 7-1/2 per cent per annum and as to which Kaymac then shall make the warranties

set forth in Paragraph 5(A) above. Such substitute mortgages, acceptable to Trans-National, shall have such admitted asset value as will put the parties in the same position as they would have had if such substitute mortgage had been delivered at date of "closing".

C. Kaymac agrees for itself and for its assignor of the mortgages that, prior to the time Trans-National notifies the respective mortgagors to remit payments to Trans-National, it will use all due diligence to effect collection of both principal and interest payments due with respect to the mortgages. All monies collected by Kaymac or its assignor from and after the date of the last payment of principal or interest shown to have occurred prior to Kaymac's assignment of the mortgage to Trans-Nationl shall be held by Kaymac or its assignor in trust for the benefit of Trans-National and promptly shall be remitted to Trans-National as and when received by Kaymac or its assignor, less reasonable and customary fees for servicing such mortgages.

D. Kaymac shall assign or cause the assignment to Trans-National of all guarantees or other additional collateral given by any mortgagor and shall pay to Trans-National in cash at Trans-western closing the full amount of insurance, tax, and other reserves held with respect to said mortgages as of closing by Kaymac or its assignor.

E. In determining the amount of cash to be paid Trans-National under Paragraphs 4(B) and 5(D), both parties are relying upon the mortgage payment records pertaining to each such mortgage. In the event either party later should discover an error in any such mortgage payment record which had the effect of increasing or decreasing such cash payment above or below the amount they should have been, a payment by way of adjustment shall be made to the party entitled to receive same.

6. A. "Federated closing," for purposes of this agreement, shall take place at a time and place mutually agreeable to the parties, but occurring no later than 5:00 p.m., Pacific Daylight Time, on July 30, 1969. At such closing Trans-National shall assign and deliver to Kaymac the subject Federated stock in exchange for the consideration required to be paid by Kaymac hereunder.

B. "Transwestern closing," for purposes of this agreement, shall take place in Salt Lake City, Utah at a time and place mutually agreeable to the parties, but occurring no later than 5:00 p.m., Mountain Daylight Time, on July 30, 1969. At such closing, Trans-National shall assign and deliver to Kaymac the subject Transwestern stock in exchange for the considerations required to be paid by Kaymac hereunder.

7. Trans-National warrants and represents to Kaymac:

A. There has been no material reduction in assets or material increase in liabilities of Federated since its annual statement dated December 31, 1968, save and except such reductions or increases as may result from the following, whether or not deemed to be material:

(1) Eight (8) of the Safeway Stores, Inc. bonds maturing November, 1969, par value $1,000.00 each, were called in 1968 and, although there is no forfeiture of principal, will not bear interest from date of call. Such bonds were surrendered to the issuer's agent on July 15, 1969.

(2) Commercial paper, valued at $170,000.00 on Federated's annual statement for year ending December 31, 1968, was reduced as an admitted asset to approximately $89,000.00 by a Utah examiner. Trans-National does warrant that such decision is being presented by Federated to the Utah Attorney General for review and that, during 1969, approximately $120,000.00 of such

commercial paper was liquidated and replaced by bonds, or is in cash.

(3) The Utah Insurance Commissioner has disallowed a reserve credit in the amount of $115,697.28 pertaining to coinsurance treaty with Allied Life Insurance Company. Trans-National shall deliver to Kaymac at Federated closing the telegraphed confirmation from or in behalf of Allied of its verbal commitment to deposit with Federated or with the Utah Insurance Department assets in such amount if the Utah Insurance Commissioner finally determines the necessity therefor.

(4) The report of examination of Federated by the Utah Insurance Department may indicate a debtor-creditor relationship between Federated and Allied as a result of the abovementioned coinsurance treaty, with the result that Federated's liabilities would or could be increased by approximately $150,000.00 plus or minus. Kaymac agrees that if Kaymac or Federated (while under Kaymac's control) should require or attempt to require Trans-National or Oregon National to pay to Kaymac or Federated any monies regarding claimed breach of warranty with respect to the matters described in this Paragraph 7(A)(4), Kaymac will first vote its stock in Federated to cause Federated to bring suit or action against Allied Life Insurance Company to obtain judicial reformation of the coinsurance treaty in question or such other relief as may be proper and will use its best efforts to renegotiate such treaty with Allied as to eliminate any increase in Federated's liabilities in respect thereof on account of alleged debtor-creditor relationship.

(5) Schedule D, part 1 of the December 31, 1968 Federated annual statement lists Quebec Hydro-Electric Commission bonds, par value $40,000, bearing interest at 7-1/4% per annum and due in 1989. One such bond, in the amount of $20,000, mistakenly was issued to Federated as bearing interest of 6-7/8% and due in

1989, whereas the bond should bear interest of 7-1/4% and be due in 1991. The erroneously-issued bond has been redelivered to Dean Witter & Co., which has issued to Federated its receipt therefor and will deliver to Federated a bond of correct interest and maturity date, plus unpaid accrued interest of correct amount from date of the erroneous issuance.

B. Subject to the exceptions enumerated in Paragraph 7(A) above, Federated's annual statement, dated December 31, 1968 reflects the true financial condition of Federated as of such date in accordance with sound insurance accounting principles consistently applied.

C. No employment, management or consultant contracts will be outstanding as of closing which are not terminable by Federated on thirty (30) days' notice, except for agency representation contracts, if any.

D. Between December 31, 1968 and March 31, 1969 there was added to Federated's surplus account a sum of not less than $45,000.00.

E. Reported but unpaid claims on Federated policies as of Federated closing will not exceed the average of unpaid claims at the end of calendar years 1966, 1967 and 1968.

F. To the knowledge of Trans-National, Federated is in good standing in all states in which it was licensed to do business as of December 31, 1968 and in all states in which it subsequently has been so licensed.

G. There has not been filed any suit or action against Federated and none are presently existing or threatened, to the knowledge of Trans-National or Oregon National, except as may be revealed by Federated's annual statement dated December 31, 1968.

H. It is a corporation duly organized, validly existing and in good standing under the laws of the State of Oregon.

8. Kaymac warrants and represents to Trans-National:

A. It is a corporation duly organized, validly existing and in good standing under the laws of the State of Texas.

B. Kaymac has been furnished with all information concerning the business and financial affairs of Federated which it has requested and, on the basis of such information and relying upon the representations and warranties of Trans-National contained in this document, has made such investigation of the business and financial affairs of Federated as in its judgment it has deemed necessary.

C. Kaymac has made such investigation of the business and financial affairs of Transwestern as in its judgment it has deemed necessary.

D. It is purchasing from Trans-National the stock of Federated and of Transwestern described herein for investment purposes only and without a view to distribution or resale.

E. It is solvent, and neither the transactions set forth herein nor any ancillary, related transactions to which it is a party will render it insolvent.

9. A. At the instance and request of Trans-National, Kaymac agrees that if it comes into possession of the Federated stock, as contemplated hereunder, and if, as and when any Federated shareholder of record as of date of closing, still having Federated stock, wishes to sell all or any of his shares, then Kaymac will treat such minority shareholder on an equal basis and will stand ready to purchase, at the same price offered to Trans-National herein ($5.7743 per share), such shareholder's shares as are delivered by such shareholder to Kaymac prior to expiration of his statutory rights as dissenting shareholder arising from any cause by way of merger or otherwise of which there has been notice to such shareholder as may be required by law.

B. In the event any suit is filed against Trans-National, Oregon National, or any of their respective officers or directors, by any Federated shareholder of record as of date of closing, for the reason that he was not afforded the same opportunity that the majority shareholder received by this agreement, then Trans-National, Oregon National, or any of their officers or directors, will tender to Kaymac any and all defenses which they might have and Kaymac will hold such party or parties harmless of and from any loss, damage, or expenditure incurred as a direct and proximate result thereof, but only to the maximum extent of $5.7743 per share for each share of stock held by such shareholder of record at date of closing, plus necessary and reasonable court costs and attorneys' fees, in the trial court and any appellate court.

10. A. Kaymac represents to Trans-National that the individuals to be designated by Kaymac to serve as directors of Federated are to the best of its knowledge and belief of good reputation and business experience and that Kaymac has no reason to believe that the Utah Department of Insurance will raise any formal meritorious objection to new management elected by such designated individuals.

B. Kaymac agrees to hold Trans-National and Oregon National, as well as the respective officers and directors of each, free and harmless from and to indemnify Trans-National against any and all loss, costs, claims, damages, injuries, suits, actions and necessary and reasonable litigation expense in the trial or any appellate court arising out of or in any way connected with the acts, conduct or omissions of Federated, its officers or directors, from and after tender and acceptance of the resignations of a majority of the present Federated Board of Directors; provided, however, that the foregoing indemnity shall not apply to any acts or omissions, or any consequences resulting therefrom of Trans-National's or Oregon National's present officers or

directors agreeing to the sale of Federated stock by Trans-National to Kaymac.

C. Kaymac for itself and for its designees to the Federated Board of Directors shall not, by its or their voluntary act, suffer or permit Federated, in connection with the subject transactions, to diminish its assets or to incur disapproval of the Utah Insurance Commissioner.

11. All broker's commissions or finder's fees due or to become due and owing to William R. Snyder of Phoenix, Arizona, by reason of his having found Kaymac for Trans-National to make the subject purchase shall be paid by Trans-National.

12. The representations, warranties and covenants of the parties contained herein shall survive the closings and shall not in any way be limited or terminated by the happening of such event. Each party, upon demand by any other party at any time whatsoever, shall execute such other instruments of transfer, assignment, conveyance or otherwise and such other instruments and documents as by this Agreement may be required to effectuate or otherwise consummate the transactions contemplated hereby. If any party refuses to execute such instrument or document, this Agreement shall be deemed to constitute an actual transfer, assignment or conveyance as so required, and the parties agree that the obligation so to execute hereunder shall be regarded as specifically enforceable in equity.

13. In the event either party brings suit or action to enforce its rights under this Agreement, the prevailing party shall be entitled to recover from the other party, in addition to any other relief to which it may be entitled, reasonable and necessary attorneys' fees incurred by it in both the trial court and in any appellate court.

14. Notices to be given hereunder shall be sufficient if delivered by telegram or mailed by certified or registered mail,

return receipt requested, to the following addresses:

A. If for Kaymac:

Kaymac Industries, Inc.
3833 Turtle Creek Boulevard
Dallas, Texas
Attention: Mr. Richard L. Mackay, President

B. If for Trans-National or for Oregon National:

Trans-National Service Corporation
(Or Oregon National Life Insurance Co.)
610 S. W. Alder Street
Portland, Oregon 97205
Attention: Mr. H. Smith Hagan, President

15. This Agreement shall constitute the entire agreement between the parties hereto, all prior agreements between the parties regarding the subject matter hereof are superseded, and there are no warranties, representations, express or implied, other than those expressly set forth herein. This Agreement may be amended only by the parties' hereto executing appropriate written instruments for that purpose evidencing mutual agreement for the amendment.

16. This Agreement shall be deemed to be binding upon and inure to the benefit of the parties hereto, their successors and assigns, but the foregoing shall not create in any party the right to assign to any third person or entity its duties hereunder without the express consent of the other parties hereto.

IN WITNESS WHEREOF, the parties have set their hands and seals this 30th day of July, 1969.

KAYMAC INDUSTRIES, INC.

By Richard L. Mackay
Richard L. Mackay
President

TRANS-NATIONAL SERVICE CORPORATION

By H. Smith Hagan
H. Smith Hagan
President

For and in consideration of the sum of [illegible] ($10.00) and other good and valuable consideration, the receipt of which is hereby acknowledged, OREGON NATIONAL LIFE INSURANCE CO., a corporation organized and existing under the laws of the State of Oregon, in order to induce KAYMAC to enter into the foregoing agreement, does hereby adopt as its representations and warranties any and all representations and warranties made by TRANS-NATIONAL to KAYMAC herein.

OREGON NATIONAL LIFE INSURANCE CO.

By _____
H. Smith Hagen
President

THE COURT: Now, the second motion is for a judgment notwithstanding the verdict.

MR. PALMER: Yes, sir.

THE COURT: For submission of counts 1 through 15.

MR. PALMER: That is the failure to read, your Honor. I think you have already ruled on that.

THE COURT: Is that the motion for a judgment non obstante?

MR. PALMER: Yes, sir. The judgment non obstante includes several of the motions that were made through the trial which I am bringing forward.

THE COURT: For a mistrial, for submission of counts 1 through 15 and for dismissal of the indictment.

That motion is denied, and the motion for a mistrial for failure of the Government to provide evidence favorable to the defendant's case is denied.

Proceed.

MR. DUNN: The next matter then, your Honor, at this time is for sentencing defendants Mr. Brewer and Mr. Mackay. The jury trial was on December 11 through the 18th, 1972, when the jury returned a verdict against both of the defendants on all fifteen counts.

Counts 1 through 9 charged unlawful use of the mails with a scheme to defraud, in violation of 18 USC 1341 and 1342--excuse me, that should be just "2," which relates

to principals and accessories. And the maximum penalty for Counts 1 through 9 is $1,000 and five years imprisonment.

Counts 10 through 15, inclusive, charge the defendants with unlawful use and manipulation or deceptive device or contrivance in connection with the purchase or sale of a registered security. Now, that is in violation of 15 USC 78j(b) and the regulations thereunder. And that provides a maximum penalty of $10,000 and two years' imprisonment on each count.

THE COURT: All right. The defendants will come forward.

MR. DUNN: I believe there has been a presentence report prepared on this, your Honor.

THE COURT: Do you have a report?

THE PROBATION OFFICER: Your Honor, Mr. Mackay was born December, 1921, at Eastanes on the Hudson in New York. He has been married on two occasions, has six children, five by his second marriage, all of whom continue to live with him and his wife. The ages of those children range from six to fifteen years of age.

He served in the United States Marine Corps from September, '42 to February of '46, experienced combat duty in the Pacific, received an honorable discharge with a rank of sergeant. He is a graduate of the University of Cincinnati where he received his bachelor of arts degree and also his

law degree. His practice of law has been limited mostly to tax work, and he states that he did not maintain an active law practice from October of '66 until 1970, in that he was involved full time in the management of some investments.

His present financial situation, as submitted to my office, reveals assets of $5,610, liabilities totalling $38,000. His income tax returns for the years '69, '70, and '71 reveal that he sustained losses of 52 thousand, 60 thousand, and 21 thousand respectively.

At the present time, he informed me prior to these proceedings, he has a serious hernia condition that is going to require surgery in the near future.

He has no prior record.

Mr. Brewer is 52 years of age, has no prior record, was born March 21--March 2, 1921, in Lansing, Michigan. He has been married twenty-six years, has three children ages ranging from eighteen to twenty-three. He was graduated from the University of Missouri in 1943 with a degree in banking and finance. From 1944 until 1966 he was employed in the banking business in Missouri and Texas, serving in various executive capacities.

In 1966, December of 1966, he formed his own mortgage company, which he continues to operate, located in Dallas, Texas.

He claims to be in good health, has no prior criminal record, has an excellent Service record, serving as an officer in the United States Army during World War II, during which time he received the Purple Heart and six Battle Stars. He experienced combat in North Africa, the invasion of Italy, Southern France, and Central Europe.

His income has fluctuated the past several years between twenty and thirty thousand dollars a year. He lists his assets as totalling approximately 210 thousand, of which he claims 95 thousand represents uncollectible commissions. His liabilities total approximately 130 thousand.

THE COURT: All right.

MR. DUN: We have nothing further, your Honor, at this time.

THE COURT: All right, Counsel.

MR. PALMER: Your Honor, I would like to make only a few points.

Certainly the crime with which my client was charged and which the jury found him guilty is a serious crime, and I do not intend to belittle it. I would point out, of course, that it does not involve any crimes of violence or physical injury to anyone. It was a crime in which the evidence showed that my client received no substantial sum of money; that is to say, what sums were taken out of Federated Life Insurance Company went to others:

Dorsey and Company, the people on the East Coast.

Up until this event my client's record was blameless. Indeed, he might even have been regarded as exemplary and somewhat of a pillar of the community, a man specializing in tax practice, admitted in three states, a number of articles to his credit. Until this event there were no prior problems of any kind.

One of the factors this court has to consider, of course, is the deterrent effect implicit in any punishment, that is to say, to others. I am sure that no one would want to exchange places with my client now. But I would remind the court that, as a professional man and a lawyer, the conviction alone will result automatically in my client's losing his license to practice in all states, and that punishment is already implicit and will be carried out and whatever else your Honor does notwithstanding.

MR. HERRIDGE: May it please the Court, as the probation officer has stated, my client has never before been in any trouble whatsoever although, having been in the banking business for a number of years, and mortgage business, he has had certain--he could have taken money on many occasions, but he never did.

And the evidence in this case will reflect, your Honor, that my client didn't enter into this transaction in any way whatsoever until it was well on its way to

completion. The evidence will also reflect he did not receive one dime from Federated Security Life Insurance Company or from any of the other corporations involved in this thing.

Mr. Brewer has three children and a wife to support, and he is putting his three children through college right now, and they need him. And consequently we would ask the court for leniency on behalf of Mr. Brewer. His conduct in the prior 42 years of his life has been excellent. He fought for his Country. And I would request the court for its due consideration of all these factors.

Thank you, your Honor.

THE COURT: Do the defendants have anything you want to say to the court?

MR. MACKAY: No, your Honor.

THE COURT: Does the District Attorney have anything he wants to say?

MR. DUNN: We have nothing further, your Honor.

THE COURT: Will you tell me what the penalties are. I am not clear about those penalties.

MR. DUNN: Counts 1 through 9 carry a maximum penalty of one thousand dollars and five years on each count. Counts 10 through 15, inclusive, carry maximum penalties of ten thousand dollars and two years on each count.

If my arithmetic is correct, that would be a total, your Honor of 57 years maximum and 69 thousand dollars

maximum.

THE COURT: Total of what?

MR. DUNN: Total of 57 years maximum and a total of 69 thousand dollars maximum.

THE COURT: Now, are they both convicted of all fifteen counts?

MR. DUNN: That is correct, your Honor.

THE COURT: Utah people in this community over the last number of years have been victimized by a good many of these schemes to defraud. Guaranty Trust Deed Corporation is one conspicuous one. There are several others, and there are some more coming through the courts soon.

Sure, this isn't a crime of violence, but it is worse. Innocent people, old people who have saved up a little money for their old age, people who can't afford to lose that money, widows, orphans--their money goes into these schemes.

The reason they work--the schemes, I mean--is because of greed on the part of investors. Now, the reason the crimes are committed is because of the greed of the promoters. Now, this is an unfortunate thing in our society, especially this community, this state, this area. It seems we are particularly vulnerable for some reason or another, and I don't know why. These people come in here, and we are victimized.

It is my view that I would violate my oath to support and defend the Constitution of the United States and the laws if in these offenses I didn't impose severe sentences. And I have been in the habit of doing that. That is my practice here. The only question this afternoon is how severe. I am going to impose prison terms.

To start with, on Counts 1 and 9--1 to 9--the sentence will be $1,000 on 1 through 9--I am talking to Mr. Mackay now. You are sentenced on Counts 1, 2, 3, 4, 5, 6, 7, 8, and 9 $1,000 on each count, and you are sentenced to one year on each of those nine counts. You are sentenced to one year on Counts 1, 2, 3, 4, 5, 6, 7, 8, and 9, and those sentences are to run consecutively.

Now, Mr. Brewer, you are sentenced to $1,000 on Counts 1, 2, 3, 4, 5, 6, 7, 8, and 9, and you are further sentenced to one year on Counts 1, 2, 3, 4, 5, 6, 7, 8, and 9.

Now, on Counts 10 through 15, Mr. Mackay, you are sentenced to $3,000 on Counts 10, 11, 12, 13, 14, 15, and you are sentenced one year on Count 10, Count 11, Count 12, Count 13, Count 14, and Count 15, the sentences to run consecutively and to run consecutively with the sentences on Counts 1 through 9.

Mr. Brewer, you are sentenced to $3,000 on Counts 10, 11, 12, 13, 14, and 15, and you are sentenced to one

year on Counts 10, 11, 12, 13, 14, and 15, those sentences to run consecutively with each other and consecutively with the sentences imposed under Counts 1 through 9.

That is all.

MR. [illegible]: Your Honor, I have a question, if I may. Did you intend, with regard to Mr. Brewer, regarding Counts 1 through 9, that they shall be consecutive, too?

THE COURT: Yes.

MR. [illegible]: While I am at it, your Honor, may I remind the court about Rule 32.

THE COURT: What about that? Oh, yes. Tell them what Rule 32 is.

MR. [illegible]: Each of you gentlemen has a right to appeal on this matter. You can file a notice of appeal within ten days. If you do not have an attorney to do so, the clerk will be instructed at this time to file a notice of appeal for you. If you cannot afford an attorney to handle the appeal for you, one will be provided by the court.

THE COURT: Very well. The marshal will take the defendants in custody.

MR. PHILLIPS: Your Honor, may we have bond set for appeal. There is a $10,000 bond set now for, I think, each defendant, certainly defendant Mackay.

I would remind the court that defendant Mackay has been here every time he has been requested to do so,

with both his local and his general counsel. He has given no indication whatever of any reason to believe that he would not continue to obey the orders of this court or any other court. He is married. He does have five children. He owns his home and property in his residence at Dallas.

THE COURT: In what form is the $10,000 bond?

MR. PALMER: It is in the form of a surety bond, your Honor. It was set in the magistrate's court--it was set in this court, but collected by the magistrate's court in Texas at the time of arrest.

THE COURT: Well, these people are from out of the state. They live in Texas, I take it.

MR. PALMER: Yes, sir, that is true.

THE COURT: Both of them.

MR. PALMER: Yes, sir.

THE COURT: Well, this is after sentence now, and a heavy sentence.

MR. PALMER: Even so, Your Honor, I think whatever the outcome of the appeal might be, with his family responsibilities, my client must serve and will serve the sentence of the court and will obey the orders of this court to appear when so directed, and has.

This risk has been over my defendant since the beginning. Even now it has been some, I think, close to 90 days since the jury found him guilty, and he knew he was

going to face a sentence, and he is here pursuant to the court's order.

MR. HERRIDGE: All the same things are true with respect to Mr. Brewer, your Honor.

THE COURT: What is his financial condition with respect to putting up an increased bond?

MR. PALMER: My client--

THE COURT: What I am thinking about is a $50,000 bond for each one of them.

MR. PALMER: Your Honor, that would take a $5,000 premium.

THE COURT: That's right--not a premium.

MR. PALMER: My client's financial statement reflects a total of some eight thousand dollars in assets, and that is not liquid, that is including household furnishings and fixtures and automobile and things of that sort. It would be tantamount to commitment, I am afraid, your Honor.

THE COURT: Under our criminal rules here ten percent is deposited with the clerk. That is five thousand dollars. But, of course, if they jump their bail, they will be liable for the whole amount.

How about your man?

MR. HERRIDGE: Your Honor, as I understand my client's financial position, it would be an impossibility.

THE COURT: Well, he has put up a thousand dollars--

You got a surety bond for that, paid a premium.

MR. PALMER: Yes, sir, paid a thousand dollars and is in a position to pay another thousand dollars.

THE COURT: Well, if you do that, you are out the thousand dollars. If you follow-- I think, Mr. Dunn, these people, and the other defendants in this court, may put up ten percent, may they not?

MR. DUNN: That is correct, your Honor.

THE COURT: The difference between depositing the ten percent with the clerk and paying some surety company or some bail bondsman ten percent, you don't get that back. You do get it back if you deposit it with the clerk.

MR. PALMER: I think it is a much better system, your Honor.

THE COURT: Well, what I am suggesting is--what I am requiring is the deposit of five thousand dollars on the part of each defendant.

MR. PALMER: Frankly, the one thousand dollars came from his mother's savings. He just doesn't have five thousand dollars. He has a total of eight thousand dollars in assets on his balance sheet. I am not sure your Honor is aware, but we are defending this case without fee because of the past. But for this he would have had to ask for court-appointed counsel.

The days when my client had funds are long in the

past. The probation report cited the years of losses. The food is kept on the table largely because of his wife's working. The last job that my client had was in a filling station, and, frankly, they fired him in two weeks when they discovered he was a lawyer.

Please don't be misled by the fact that he was an attorney and at one time he was involved with an insurance company here. He is just almost a pauper today.

MR. HERRIDGE: Your Honor, we request the same. The same things are, frankly, true of our client. We respectfully request the court to lower the bond to ten thousand dollars.

THE COURT: The bond will be $25,000 for Mackay and $25,000 for Brewer, and the court would suggest that you deposit ten percent of that with the clerk.

Is there anything further?

MR. DUNN: Nothing further.

* * * * * * *

End Appendix

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[illegible] the other one and a half million.

MR. MACKAY: I will move to strike the last part of that.

THE COURT: That is stricken.

Q. (By Mr. Mahony) Did you and Mr. Brewer acquire another insurance company early in August of 1960?

A. I don't understand--

Q. More specifically, in Winston-Salem, North Carolina.

A. No, sir. Mr. Brewer has one or two associates in the insurance business of Kayak.

Q. I don't think that answers the question.

A. You said, "Did you and Mr. Brewer acquire an insurance company?" No we did not.

Q. I said also, "in Winston-Salem, North Carolina."

A. No. Not in Winston-Salem or anyplace else.

Q. Mr. Mackay, would you please look at Government's Exhibit 66 for identification. Have you ever seen either the original or a copy of that letter before?

THE CLERK: I meant to say "6", and I put "66".

Q. (By Mr. Mahony) Is that 6?

A. 66.

THE CLERK: It should be 6.

THE WITNESS: I can't read this at the top.

Q. (By Mr. Mahony) I am still talking about the letter.

A. I have never seen this before.

Does it bear another signature?

A It bears a scribble.

Q Scribble or not, would you agree that is a signature?

A I mean I so. It is in the sense that might be a signature, that a signature would sometimes go.

Q Who would have the authority to sign for you other than yourself in a transaction such as this?

A No one.

Q No one. What about the secretary-treasurer of your company?

A No one has the authority to sign for me except me.

Q But he could sign on behalf of the company, couldn't he?

A No, sir.

Q He couldn't?

A No, sir.

Q Did you maintain the entire control of the company in your hands?

A According to the board of directors resolution I was the sole executive officer of the corporation; no one else could sign for Kaymar.

Q This is Federated. Who else could sign your name for Federated?

A No one.

Q No one. Well, did you maintain the entire corporate control of Federated in your own hands?

A The board of directors of Federated Security authorized me to act as chief executive officer with sole authority to run the company, subject to the control of the board.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6931

RICHARD L. MACKAY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 74-19

CHESTER BREWER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Both petitioners urge that the sentences imposed were unduly harsh and should be reduced. In addition, petitioner Brewer contends that the evidence was insufficient to support his conviction, that separate mailings were improperly made the basis of separate counts, and that the instructions were improper.

After a jury trial in the United States District Court for the District of Utah, each petitioner was convicted on nine counts of mail fraud, in violation of 18 U.S.C. 1341 and 2,

and six counts of fraud in the sale of securities, in violation of 15 U.S.C. 78j(b) and 78ff and 18 U.S.C. 2. Each was sentenced to consecutive terms of imprisonment for one year on each count (a total of fifteen years) and each was fined $27,000. The court of appeals affirmed. On February 4, 1974, it denied motions for rehearing, but partially remanded the case for the purpose of giving the district court an opportunity to reconsider the sentences. *United States* v. *Mackay* (Brewer Pet. App. A-9—A-10; 491 F. 2d 616, 624-625). On January 5, 1974, Mackay petitioned for a writ of certiorari, urging that the sentence imposed was unduly harsh and other grounds. *Mackay* v. *United States*, No. 73-6045, certiorari denied April 29, 1974.

On April 12, 1974, the district court reconsidered its original sentence, pursuant to the direction of the court of appeals. The court adhered to its original sentence, giving its reasons therefor in an extensive opinion (Mackay Pet. App.; Brewer Pet. App. A-12—A-17). No appeals were taken from this order. Mackay's present petition for a writ of certiorari was filed on June 21, 1974; Brewer's petition for a writ of certiorari was filed on July 26, 1974.

The judgment of the court of appeals became final on February 4, 1974, and both petitions for certiorari are therefore out of time under Rule 22(2) of the Rules of this Court. In any event, the contentions sought to be raised are without merit.

The evidence, briefly summarized, showed that Brewer, as secretary-treasurer of Kaymac Industries, Inc., aided and abetted the fraudulent scheme of petitioner Mackay, president of Kaymac, to acquire control of two insurance companies by stripping the assets of one of them to finance the acquisitions. In July 1969 the two arranged to borrow for a very short period the sum of $3,300,000 from Dorsey & Co., a New Orleans brokerage

company, for the purchase of 93 percent of the capital stock of Federated Security Insurance Company. Dorsey & Co. was to recoup its loan by the sale of Federated's assets, which were to be assigned to Dorsey & Co. for that purpose. The $3,000,000 was paid to one Hagan, the president of another insurance company which was the parent company of a corporation owning the controlling stock of Federated. Hagan received an additional $790,000 in mortgages owned by Federated for his sale to Kaymac of a block of stock of Transwestern Life Insurance Company (Brewer Pet. App. A-3).

Dorsey & Co. insisted that the assets of Federated which they had been authorized to sell had to be replaced. Petitioners therefore arranged with United Housing Corporation of New York for the purchase of 4.5 million dollars in government mortgages. These mortgages were reassigned in turn to United Housing as security for the sale and petitioners signed promissory notes for 4.5 million dollars and obligated Federated to repurchase the notes in case of default by Kaymac, the primary obligor in the purchase. The purchase of Federated stock was completed for $3,000,000, advanced temporarily by Dorsey, which recouped its loan plus interest and a substantial commission by sale of Federated's portfolio. Federated received back $531,000 from this sale, which petitioners used to buy stock of Transwestern Insurance Co. for Kaymac. Assets of Federated were used to pay debts of Kaymac and personal obligations of both petitioners. As the court of appeals pointed out, Federated became legally responsible to pay for the mortgages purchased and its title was only a naked legal title which lacked any equity or substance (Brewer Pet. App. A-3—A-4).

1. The evidence was sufficient to establish petitioner Brewer's knowing participation in the scheme to defraud. Petitioner Brewer, during the time period alleged in the indictment, personally performed several steps in the fraudulent scheme (*e.g.*, reassignment of mortgages to United Housing) and aided petitioner Mackay in the performance of other steps in the scheme (Brewer Pet. App. A-5, A-9). The factual determinations in this complicated case were properly made below on sufficient evidence and do not call for further review by this Court.

2. There was no error in assigning a separate count for each mailing. Each mailing involved a separate step in furtherance of the fraudulent scheme and constituted a separate violation.[1] *Badders* v. *United States*, 240 U.S. 391; *United States* v. *Eskow*, 422 F.2d 1060, 1064 (C.A. 2), certiorari denied, 398 U.S. 959; *United States* v. *Williams*, 424 F.2d 344, 351 (C.A. 5), affirmed, 447 F. 2d 1285, certiorari denied, 405 U.S. 954.

3. Petitioner Brewer contends that it was error for the court to fail to give an accomplice instruction as to the testimony of Hagan and Dorsey, who testified for the government, since they were arguably accomplices. It should be noted, however, that petitioners neglected to object specifically to the court's failure to provide this instruction. Even assuming *arguendo* that the court erred in failing to provide an accomplice instruction, the error was harmless in that the case against petitioners was fully proven without reference to the testimony of Hagan and Dorsey. The heart of the

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[1] *United States* v. *Maze*, 414 U.S. 395, cited by Brewer, is wholly inapposite, as pointed out by the court of appeals in ruling on the motion for rehearing (Brewer Pet. App. A-9; 491 F. 2d at 624), since the mailings here were an integral part of the scheme to defraud.

fraudulent scheme was the purchase of Federated by the use of Federated's funds, where petitioner Brewer's participation was established by documentary evidence independent of the testimony of Dorsey or Hagan. In these circumstances the court below properly regarded the failure of the court to give cautionary instructions as to the testimony of Dorsey and Hagan insufficient to justify reversal of petitioners' convictions (Brewer Pet. App. A-6).

Petitioner Brewer also contends that it was error for the court to instruct the jury that statements made "carelessly" are tantamount to fraudulent ones. When considered as a whole, however, the instruction properly conveyed the meaning of "fraudulent statements." The instruction gave as examples of such statements those made without regard to whether they are true or false, statements put forth without a reasonable basis, statements of fact implying knowledge where there is no knowledge, expressions of opinion where the speaker has no opinion in fact, and promises made recklessly without reasonable basis for belief that they can be fulfilled (Brewer Pet. App. A-8; 491 F. 2d at 623). Insertion of the word "carelessly" did not, therefore, render the instructions erroneous.[2]

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[2] The questions other than severity of the sentence sought to be raised by Brewer are substantially those raised by Mackay in No. 73-6045, determined adversely as to Mackay by denial of his petition for a writ of certiorari on April 29, 1974.

4. Petitioners' contention as to the severity of the sentence imposed is not properly before the Court, as the case was partially remanded to the district court for reconsideration of the sentence and no appeal has been taken from the district court's final action. In any event, we submit that in light of the scope and extent of petitioners' fraudulent scheme, the district court did not abuse its discretion in sentencing each petitioner to fifteen years' imprisonment.

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.

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